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YOU ONLY GET WHAT YOU CAN PAY FOR: *DZIUBAK v. MOTT* AND ITS WARNING TO THE INDIGENT DEFENDANT

INTRODUCTION

When an innocent person is convicted of a crime because the attorney he hired was negligent, that person has a legal action against the attorney for malpractice.¹ Logically, it would not make a difference whether the attorney was hired by the person himself or whether the attorney was appointed by the state as a public defender. The Minnesota Supreme Court disagreed with this logic when it decided *Dziubak v. Mott*.² Richard Dziubak should have been able to sue his attorneys for their alleged negligence and be compensated for the sixteen months he spent in prison and the \$32,000 in legal fees he incurred to obtain his freedom.³ However, when Mr. Dziubak attempted to sue his attorneys, the Minnesota Supreme Court granted them absolute immunity from any liability.⁴ The court justified this decision by stating that indigent defendants with allegedly negligent court-appointed attorneys have remedies through the appeal process, motions for post-conviction review, and habeas corpus relief.⁵ The court further reasoned that holding the attorneys liable might inhibit their independence and deter others from joining their profession.⁶ With this sweeping decision, Richard Dziubak was deprived of his cause of action against his attorneys because they had been his public defenders.⁷ In *Dziubak v. Mott*,⁸

1. See *infra* notes 67-74 and accompanying text (discussing malpractice and the elements of a negligence claim against attorneys).

2. 503 N.W.2d 771 (Minn. 1993).

3. See *infra* notes 259-89 and accompanying text (discussing the factual background giving rise to Mr. Dziubak's negligence action against his attorneys).

4. *Dziubak*, 503 N.W.2d at 773.

5. *Id.* at 774-77.

6. *Id.*

7. Throughout this Note, the term "public defender" will refer to state public defenders, unless otherwise indicated in the text. The term will also be used to include attorneys working for a Public Defender Office and court-appointed counsel. For an overview of the different types of public defense systems, see *supra* notes 34-39 and accompanying text. Where the distinction between the types of systems is important, it will be indicated in the text.

8. 503 N.W.2d 771 (Minn. 1993).

the Minnesota Supreme Court became the latest to join an unwelcome trend in holding public defenders immune from malpractice liability.⁹

In exploring this issue, the first section of this Note provides a brief overview of the public defense system in this country, explaining how and why public defenders are an essential element of the criminal justice system.¹⁰ The problems of underfunding and overburdened caseloads of public defense are also discussed to illustrate why many malpractice claims arise.¹¹

The next section presents the basic elements a former defendant must prove in his malpractice claim,¹² and also discusses the civil rights claim a client may bring against his public defender.¹³ The following section details the different theories of immunity granted to certain government bodies.¹⁴

Next, this Note presents the federal courts' opinions discussing immunity, including typical state malpractice actions and civil rights claims.¹⁵ While federal courts once appeared to be moving away from granting immunity to federal public defenders, they may now be moving toward it in light of recent federal legislation.¹⁶ Similarly, while the state courts have historically refused to grant immunity, they too are increasingly extending it to their public defenders.¹⁷

This Note then presents the state courts' treatment of public defender immunity, including state court decisions which hold public defenders liable for their malpractice,¹⁸ and state court decisions

9. See *infra* notes 234-57 and accompanying text (discussing recent state court decisions in which immunity from state malpractice claims was extended to public defenders).

10. See *infra* notes 26-39 and accompanying text (discussing the right to counsel and defense systems which provide counsel for indigent defendants).

11. See *infra* notes 40-59 and accompanying text (discussing the problems of the public defender and their effect on the indigent defendant).

12. See *infra* notes 63-74 and accompanying text (discussing how an indigent defendant may bring a malpractice claim against a public defender and discussing the elements for such a cause of action).

13. See *infra* notes 111-46 and accompanying text (discussing section 1983 of the Civil Rights Act).

14. See *infra* notes 79-107 and accompanying text (discussing different categories of immunity).

15. See *infra* notes 111-95 and accompanying text (discussing section 1983 cases and malpractice immunity cases).

16. See *infra* notes 111-46 and accompanying text (discussing section 1983 civil rights cases).

17. See *infra* notes 196-257 and accompanying text (discussing state court cases both refusing and granting malpractice immunity to public defenders).

18. See *infra* notes 196-233 and accompanying text (discussing states' bases for refusing to

which hold public defenders immune from such liability.¹⁹ While most states addressing the issue have declined to grant immunity, the trend in some states is to extend such immunity.²⁰

Section III provides a detailed summary of *Dziubak*²¹ and the Minnesota Supreme Court's opinion,²² and is followed by the Analysis section which examines the public policy concerns cited in the case decision in light of the substantial body of precedent.²³ The Analysis section also challenges each of the arguments the court advanced to support its ruling, ultimately concluding that the court wrongly decided the issue. The Analysis next presents alternatives to immunity that are far more fair and less harmful to the indigent client.²⁴ Finally, the Impact section illustrates the ramifications of *Dziubak*, and other cases like it, with the most notable result being the court's failure to address the real problems facing public defense.²⁵ This Note endeavors to illustrate that the concerns of the court, while valid, should not serve to denigrate the right of an indigent to sue for malpractice.

I. BACKGROUND

A. Right to Counsel

It has only been in the last half of this century that criminal defendants have truly gained one of the most crucial protections afforded them: the right to counsel.²⁶ Although the Constitution

grant malpractice immunity to public defenders).

19. See *infra* notes 234-57 and accompanying text (reviewing state court decisions granting malpractice immunity to public defenders).

20. See *infra* note 234-57 and accompanying text (citing several state court decisions granting immunity, signalling a move in the direction of extending immunity to public defenders from state malpractice claims).

21. See *infra* notes 259-310 and accompanying text (discussing *Dziubak v. Mott*, 503 N.W.2d 771 (Minn. 1993)).

22. See *infra* notes 320-76 (discussing the policy basis for the Minnesota Supreme Court's decision in *Dziubak*).

23. See *infra* notes 303-10 and accompanying text (addressing the arguments the Minnesota Supreme Court relied on in deciding *Dziubak*).

24. See *infra* notes 346-53 and accompanying text (discussing indemnity and state-covered insurance as alternatives to immunity that still address deterrence concerns).

25. See *infra* notes 320-76 and accompanying text (discussing the ramifications of extending immunity to public defenders for their malpractice).

26. As Justice Sutherland stated:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is

grants all criminal defendants the *right* to counsel,²⁷ the Supreme Court did not require the appointment of counsel for indigent defendants until 1932.²⁸ Today, all indigent defendants, whether in federal²⁹ or state³⁰ prosecutions, and whether charged with a felony³¹ or a misdemeanor,³² have the right to appointed counsel.

Following these decisions, states who had not already done so implemented systems to provide counsel for indigent defendants.³³ The state systems typically fall into one of three defense systems — the assigned counsel system, the public defender system, and the con-

unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

27. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

28. *Powell*, 287 U.S. at 71 (holding that the Due Process Clause of the Fourteenth Amendment requires states to uphold the right of counsel to defendants charged with capital crimes, and if a defendant was indigent, the state, in certain situations, had to appoint counsel for him).

29. *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (holding that under the Sixth Amendment, all defendants charged with a federal crime have the right to retain counsel, and if they are indigent, to have counsel appointed for them).

30. *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (holding that all defendants in state felony prosecutions have the right to counsel, and if indigent, to have counsel appointed for them); see also *infra* note 32 (noting other proceedings in which courts have found the right to counsel to attach).

31. *Gideon v. Wainwright*, 372 U.S. at 341 (state felonies); *Johnson v. Zerbst*, 304 U.S. 458, 459-60 (1938) (federal crimes).

32. See *Argersinger v. Hamlin*, 407 U.S. 25, 39-40 (1972) (holding that all criminal defendants have the right to counsel where imprisonment is a potential penalty). The Court has also extended the right to juvenile delinquency proceedings where confinement might result, *In re Gault*, 387 U.S. 1, 41 (1967), and to first appeals of right, *Douglas v. California*, 372 U.S. 353, (1963); cf. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (holding that the right to counsel does not extend to defendants in misdemeanor prosecutions where only a fine might be given). The right to counsel may be waived by the defendant. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948).

33. See, e.g., MINN. STAT. ANN. §§ 611.14-.21, .23-.27 (West Supp. 1995) (providing for the establishment and funding of the Minnesota public defender's office). Actually, at the time of *Gideon*, 37 states already provided counsel as a matter of right in felony prosecutions. ANTHONY LEWIS, *GIDEON'S TRUMPET* 132 (1964). Still, prior to the Supreme Court's decisions mandating the provision of counsel, there was a low demand for defense services and therefore the need was met mostly through local court-appointed counsel. Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 478. Thus, in 1961, only three percent of the country's counties had formal public defender offices, servicing approximately 25% of the population. *Id.* at 481 n.40.

tract counsel system.³⁴ Under the assigned counsel system, the court appoints private lawyers to represent indigent defendants.³⁵ Under the public defender system, the jurisdiction establishes a public defender's office to provide counsel to indigent criminal defendants.³⁶ In order to meet *Gideon's* mandate,³⁷ many jurisdictions established these public defender offices believing they were more economical than appointed counsel systems.³⁸ Under the contract counsel system, a court "contracts" with a private lawyer or law firm to represent poor defendants.³⁹

B. *The Problems of the Public Defender*

Along with the Supreme Court's unequivocal pronouncement of the right to counsel⁴⁰ came many problems for public defender offices: most notably, under-funding and over-burdened case loads.⁴¹

34. See Jill Smolowe, *The Trials of the Public Defender*, TIME, Mar. 29, 1993, at 48, 49-50 (explaining the three systems and noting the problems with each).

35. NORMAN LEFSTEIN, A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR, METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 8 (1982). About 30% of the U.S. population live in counties using the assigned counsel system. Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?* 22 RUTGERS L.J. 361, 364 (1991). There may also be "mixed systems" where both public defenders and assigned counsel represent many indigent defendants. LEFSTEIN, *supra*, at 8.

Prior to the Supreme Court's explication of the right to counsel, the assigned counsel system was most prevalent because there was no general requirement that states provide the indigent with counsel, and therefore there was a limited need for public defense. Mounts, *supra* note 33, at 478 ("[U]ntil fairly recently, attorneys were expected to provide these services out of a sense of professional and community responsibility.").

36. Feeney & Jackson, *supra* note 35, at 363 (stating, "when the state supplies counsel . . . it may create a public defender's office to provide counsel for indigent defendants generally").

37. *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (holding that the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right under the Due Process Clause of the Fourteenth Amendment).

38. Mounts, *supra* note 33, at 480-81 (explaining that the Supreme Court's expansion of the right to counsel warranted criminal defense services on a "totally unprecedented scale," creating a "great incentive to local governments to minimize the expense of providing those attorneys").

Earlier proponents of the public defender system argued that this system would provide more competent representation by allowing its lawyers to specialize in criminal law and receive regular, reasonable salaries, unlike appointed counsel who usually were expected to donate their services. *Id.* at 480.

39. Feeney & Jackson, *supra* note 35, at 363. About 5% of the U.S. population live in counties served by contract counsel. *Id.* at 364.

40. *Gideon*, 372 U.S. at 345.

41. For numerous accounts of lawyers lamenting the lack of resources and the number of cases, see Smolowe, *supra* note 34, at 48-50. One Louisiana attorney became so frustrated he brought suit against himself alleging incompetence. *Id.* at 48.

The Bureau of Justice Statistics for fiscal year 1978 shows that state and local governments allocated only 1.5 percent of their criminal justice funds to public defense.⁴² Today, that figure stands at only 2.3 percent, with the bulk of criminal justice funds going to law enforcement, prosecutions, and prisons.⁴³

The direct result of this underfunding is an inability to hire enough attorneys,⁴⁴ resulting in overburdened case loads.⁴⁵ Many studies have found that excessive caseloads is the most significant problem facing public defenders.⁴⁶ In 1970, one commentator found that public defenders in New York City had an average caseload of 922 cases a year; public defenders in Philadelphia carried 600 to 800 cases annually; and public defenders in Oakland carried 300 a year.⁴⁷ In severe contrast to these numbers, one research group concluded, after studying public defender offices in Chicago, Detroit, St. Louis, Oakland, San Francisco, Philadelphia, and Washington D.C., that a workable caseload would be 35 cases annually per attorney.⁴⁸ Unfortunately, the problems are getting worse because as state and local governments reduce the funding available for public defense,⁴⁹ the crime rate and number of arrests keep escalating, thus increasing the need for public defenders.⁵⁰

42. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1980 11 (1981).

43. Smolowe, *supra* note 34, at 48. Prosecutors receive approximately four times the amount of money that state and local public defenders receive. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1992 2-3 (1993).

44. Mounts, *supra* note 33, at 483.

45. For example, in 1985, there were six public defenders in Albuquerque's Metro Court assigned to handle 13,000 misdemeanor cases annually. Smolowe, *supra* note 34, at 49. The Chief Public Defender succeeded in getting funds to hire three more lawyers, but even then, public defenders did not meet with clients until half an hour before they appeared in court. *Id.*

46. The National Institute of Justice reported that public defenders identified their most pressing problems as excessive caseloads, funding shortages, information management, and staff shortages. *Assessing Criminal Justice Needs*, RESEARCH IN BRIEF (Dep't of Justice/ Nat'l Inst. of Justice), Aug. 1992, at 2, 6. National Institute of Justice Director Charles B. DeWitt posits that the most prevalent problem faced by criminal justice agencies across the nation is increased workloads as a result of illegal drugs and violent crime. *Id.* at 1.

47. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1248 (1975).

48. Paul B. Wice & Peter Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161, 182 (1974).

49. Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L. J. 363, 363 (1993) [hereinafter Klein, *Eleventh Commandment*] ("[D]ue to widespread financial difficulties impacting local and state governments, the money available for court-appointed counsel and public defenders has actually declined in many localities.").

50. Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Com-*

Obviously, the number of cases an attorney has at one time seriously impacts an attorney's time to prepare for a case.⁵¹ A lack of time that is spent on a case can result in inadequate preparation and analysis.⁵² The American Bar Foundation reported that most judges identified an attorney's preparation of a case to be the most important indicator of his competence.⁵³ Overburdened caseloads decrease an attorney's preparation time and therefore, his competence at trial. As the former Chief Judge of the United States Court of Appeals for the Second Circuit stated, "[j]udges have been exceedingly troubled by the increasing number of instances of poor legal representation that come to our attention. . . . I shall not hazard a guess as to the exact percentage of cases that have suffered from inadequate advocacy, but I can say that in my view it is not insubstantial."⁵⁴

petent Representation and Proposals for Reform, 29 B.C. L. REV. 531, 533 (1988) [hereinafter Klein, *Relationship*] (explaining that "[t]he problem of ineffective assistance is becoming more severe as state and local governments reduce the funding available for representing the indigent at the same time that the number of arrests and, therefore, the need for public defenders increases"). The 1970's war on crime and the 1980's war on drugs led to an increase in law enforcement, and as a result, an increase in arrests, prosecutions, and trials. Smolowe, *supra* note 34, at 49. Naturally, this created a heightened demand for public defense services. *Id.* However, funding for public defense did not proportionately increase and has led to exacerbate the problem of overburdened caseloads. Klein, *Eleventh Commandment*, *supra* note 49, at 363.

51. Some lawyers describe the process as "plead-'em-and-speed-'em-through." Smolowe, *supra* note 34, at 48. A public defender may often meet his clients for the first time in court. *Id.*; see also *supra* note 45 (describing Albuquerque's situation where public defenders often first meet clients half an hour before court appearances). The court in *Dziubak* also noted that the state's public defenders were operating significantly beyond their capacity and had "insufficient time to devote to their cases and their clients." *Dziubak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993).

52. The majority in *Dziubak* noted that malpractice can result from "acts or omissions due to impossible caseloads and an under-funded office." *Dziubak*, 503 N.W. 2d at 776; see also Smolowe, *supra* note 34, at 48 (discussing one public defender's suit against himself, alleging incompetence due to his overburdened caseload).

53. Dorothy L. Maddi, *Trial Advocacy Competence: The Judicial Perspective*, 1978 AM. B. FOUND. RES. J. 105, 144. For a more optimistic, though unconvincing perspective, see *Matthews v. United States*, 518 F.2d 1245, 1246 (7th Cir. 1975) (stating "we take judicial notice of the fact that those who are the busiest and under the greatest pressure often perform with the greatest skill, diligence and effectiveness").

54. Klein, *Relationship*, *supra* note 50, at 569 (citing Irving R. Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A. J. 175, 176 (1974)). Klein also cites to an excerpt from the *Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, which stated:

[T]he most startling testimony came from a former U.S. Attorney for Connecticut who stated that of the last twelve cases he tried as U.S. Attorney he was of the opinion that one-half of the defendants were convicted *because of* incompetency of their counsel. This so shocked him that he resigned his office to become the first head of the Connecticut Criminal Defense Committee.

Id. (quoting the *Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 159, 166 (1975)) (emphasis added).

Underfunding not only causes an insufficient number of attorneys in the public defenders' office, but results in inadequate training of the lawyers that are hired. This also increases the likelihood of inadequate representation. The Final Report of the National Study Commission on Defense Services found that underfunding for "training of lawyers who perform services for the poor has been a major cause of the totally inadequate services being delivered today in many, if not most U.S. jurisdictions."⁵⁵

Because the problems facing public defender offices directly effect the indigent defendant,⁵⁶ these problems must be addressed. As the American Bar Association Standing Committee on Legal Aid and Indigent Defendants stated, "if providing an attorney to the poor is to be meaningful, it is essential that the lawyer render *effective* legal assistance."⁵⁷ The Committee stated that public defender offices must have enough lawyers to avoid overburdened case loads and their salaries have to be comparable to private attorneys.⁵⁸ The same holds true for assigned counsel, in order to ensure they "do everything required to defend their clients."⁵⁹

Problems of inadequate legal defense services will remain and most likely increase until the defender systems are cured of underfunding and overburdened case loads.⁶⁰ The escalating problems may explain the increasing amount of malpractice claims being brought against public defenders.⁶¹ The seemingly insurmountable

55. NAT'L STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, FINAL REPORT 242 (1976). Lack of training and experience is most prevalent in court-appointed defense systems. See Smolowe, *supra* note 34, at 50 (explaining that assigned attorneys are often "young and inexperienced or old and tired"). One example occurred in a capital case where a court appointed lawyer, realizing he could not handle the case alone, requested co-counsel and received a 75-year old lawyer with almost no criminal experience. *Id.* The lawyers conducted no investigation, interviewed no witnesses in person, never went to the crime scene, and introduced no evidence for their client's defense. *Id.* Following a conviction and death sentence, a federal judge ordered a new trial, finding the first to have been "fundamentally unfair." *Id.* When the second trial finally begins, it will be ten years after the defendant's arrest. *Id.*

56. See *supra* notes 44-55 and accompanying text (discussing the results of underfunding and overburdened case loads).

57. LEFSTEIN, *supra* note 35, at 5.

58. *Id.* at 11.

59. *Id.*

60. The court in *Dziubak*, citing a statewide study, stated that the problems of underfunding and excessive caseloads were only getting worse. *Dziubak v. Mott*, 503 N.W. 2d, 771, 775 (Minn. 1993).

61. Generally, claims against criminal attorneys are only a small fraction of all malpractice claims; however, such claims are increasing in frequency. ABA STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE: A STATISTICAL STUDY OF DETERMI-

problems may also explain the trend in states' responses of extending immunity to public defenders against malpractice.⁶²

C. *Malpractice in Criminal Law*

Before discussing public defender immunity, a brief overview of legal malpractice in criminal law and basic theories of immunity is provided below.⁶³ If a client feels that he has not received competent legal representation, he may sue his lawyer for malpractice, usually alleging negligence.⁶⁴ Negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."⁶⁵ A cause of action against an attorney for negligence is basically the same as any other negligence action.⁶⁶ The plaintiff must show that his lawyer owed him a duty,⁶⁷ his lawyer breached that duty,⁶⁸ the breach of that duty was a proximate

NATIVE CHARACTERISTICS OF CLAIMS ASSERTED AGAINST ATTORNEYS 8 (May 1986); RONALD E. MALLEN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* 284 (3d ed. 1988). Claims against public defenders are similarly increasing. "Inadequate funding has created a situation wherein overburdened defense counsel cannot possibly provide competent representation to all of the clients they are assigned to represent." Klein, *Eleventh Commandment*, *supra* note 49, at 363. For examples of cases in which a malpractice claim was brought against a public defender, see *Ferri v. Ackerman*, 440 U.S. 907 (1979); *Clay v. Doherty*, 608 F. Supp. 295 (N.D. Ill. 1985); *Bledstein v. Superior Court*, 162 Cal.App.3d 152 (2d Dist. 1984); *Spring v. Constantino*, 362 A.2d 871 (Conn. 1975); *Vick v. Haller*, 512 A.2d 249 (Del. Super. Ct.), *aff'd*, 514 A.2d 782 (Del. 1986); *Hogan v. Peters*, 353 S.E.2d 601 (Ga. App. 1987); *Donigan v. Finn*, 290 N.W.2d 80 (Mich. App. 1980); *Reese v. Danforth*, 406 A.2d 735 (Pa. 1979).

62. See *infra* notes 234-55 and accompanying text (discussing the extension of civil immunity to public defenders in malpractice actions).

63. Criminal defendants may also appeal a conviction based on ineffective assistance of counsel: the defendant must show that his attorney was negligent and that but for his attorney's ineffectiveness, the trial result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

64. The most frequently alleged bases of malpractice are negligence and breach of a fiduciary obligation, which involves the lawyer breaching his duty of "undivided loyalty and confidentiality" to the client. ABA STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, *THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE* 4 (1992). The negligence theory, though, is the most commonly used, as well as the most successful. DAVID J. MEISELMAN, *ATTORNEY MALPRACTICE: LAW AND PROCEDURE* § 2:5 (1980). Other theories include breach of an implied promise, tort concepts, contract principles, theories combining tort and contract ideas, or even no specific basis. *Id.* § 2:3.

65. *RESTATEMENT (SECOND) OF TORTS* § 282 (1965).

66. Laurence H. Schnabel et al., *Some Aspects and Issues of Legal Malpractice*, in *DEFENDING THE PROFESSIONAL* at 313, 321 (PLI Litig. & Admin. Practice Course Handbook Series No. 125, 1982) (discussing the essential elements for a claim of legal malpractice).

67. *Id.* There must be an actual attorney-client relationship for a duty of care to exist. MEISELMAN, *supra* note 64, § 2:1. For a duty to exist, it does not matter whether the lawyer is paid for his services or not. *Id.*

68. Whether or not a party breaches his duty depends on the standard of care that is imposed on the defending party. In a typical negligence action, the law imposes a standard of care which the reasonable person would have exercised. W. PAGE KEATON ET AL., *PROSSER AND KEATON ON*

cause of the resulting injury suffered,⁶⁹ and his attorney's negligence resulted in actual damage.⁷⁰

Although these four elements apply in all negligence actions brought against attorneys, the criminal defendant may find it more difficult to successfully prove them. For example, the third element of a negligence claim, causation, can be an especially onerous burden on the criminal defendant.⁷¹ In establishing causation in any malpractice action against an attorney, the plaintiff must "prove that but for the attorney's negligence he should have achieved a better result."⁷² A client suing his criminal lawyer, however, carries a heavier burden: although actual innocence is not typically a required element in a negligence action, recently it has been held to be relevant.⁷³ Furthermore, some courts require the criminal defendant to

THE LAW OF TORTS § 32, at 185 (5th ed. 1984). Thus, the duty of care expected from a professional (such as a doctor or lawyer) "is to use such skill, prudence and diligence as other members of his profession commonly possess and exercise." Schnabel et al., *supra* note 66, at 322. A typical manner in which judges present this standard to the jury is "that the [professional] must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing; and a [professional] will be liable if harm results because he does not have them." KEATON et al., *supra*, § 32, at 187.

Some jurisdictions recognize a higher standard of care for professionals specializing in a certain field, including lawyers, so the criminal attorney may be required to "possess and exercise knowledge and skills not usually expected of the ordinary civil practitioner." MALLEN & SMITH, *supra* note 61, § 21.1. Mallen & Smith highlight some of the differences between criminal and civil proceedings, such as discovery rules, burdens of proof, and admissibility of evidence. The differences are based on the fact that the criminal attorney is not concerned so much with his client's financial status, but rather with his client's liberty and/or life. *Id.*

69. For a former criminal defendant, currently suing in civil court, this means that even where the attorney's negligence is provable, the client has to prove that this negligence proximately caused his conviction. MEISELMAN, *supra* note 64, § 16.1; see *infra* notes 78-79 (discussing additional elements that some courts require for a successful malpractice claim).

70. Schnabel et al., *supra* note 66, at 321-22 (discussing the elements of a negligence action against an attorney).

71. For a discussion of the higher burden faced by a criminal defendant in a legal malpractice action, see *infra* notes 73-74 and accompanying text.

72. Mallen & Smith, *supra* note 61, § 21.3.

73. *Id.* For example, the Alaska Supreme Court has recently held that in proving causation, the criminal defendant must prove *legal* innocence, i.e. that the jury would not have found him guilty beyond a reasonable doubt. *Shaw v. State*, 861 P.2d 566, 572 (Alaska 1993). The same court also held that the attorney could raise actual guilt of his client as an affirmative defense. *Id.* at 571. The dissenting opinion criticized the ruling because the defendant, in proving his legal innocence, could only use the evidence and witnesses that were present at his trial. *Id.* at 574 (Compton, J., dissenting). The attorney, though, in proving actual guilt of his former client, is not so limited and could use confidential communications he had with his client and otherwise suppressible evidence. *Id.* (Compton, J., dissenting). It should be noted that some courts do require the criminal defendant to prove his actual innocence of the underlying offense before he can succeed against his attorney. Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991) (holding that a criminal defendant must prove by preponderance of the evidence that he is innocent of the crime charged); Morgano

obtain a reversal of his conviction or other post-conviction relief before he may successfully sue his attorney for malpractice.⁷⁴

In addition to malpractice actions, former defendants have also brought actions against their defense attorneys under the Civil Rights Act ("section 1983").⁷⁵ In fact, most of the actions that are brought against appointed counsel are brought by former convicted clients who appear pro se under section 1983.⁷⁶ Section 1983 states a cause of action for any person who has been deprived of a constitutional right by another person acting under color of state law.⁷⁷ Many indigent clients have tried to sue their public defenders under section 1983 because of a perceived denial of their Sixth Amendment right to effective counsel.⁷⁸ Section 1983 actions are discussed in more detail below, following an overview of immunity.

D. Immunity

Immunity generally is a "freedom or exemption from penalty,

v. Smith, 879 P.2d 735, 738 (Nev. 1994) (citing several cases in support of its holding that criminals must prove actual innocence in order to prevail).

74. See e.g., Shaw v. State Dept. of Admin., 816 P.2d 1358, 1360 (Alaska 1991) (holding that a convicted criminal defendant has to obtain post-conviction relief prior to suing his attorney for malpractice); Morgano v. Smith, 879 P.2d 735, 738 (Nev. 1994) (holding that the criminal defendant must plead that he obtained appellate or post-conviction relief to survive a motion for summary judgment or a motion to dismiss); Stevens v. Bispham, 851 P.2d 556, 561, 566 (Or. 1993) (holding that a convicted criminal defendant must plead exoneration of the crime through a reversal on appeal or other post-conviction relief to succeed in his claim against his attorney).

75. 42 U.S.C.A. § 1983 (1994). This statute provides a civil action for deprivation of rights and states that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

76. MEISELMAN, *supra* note 64, § 16:2. These types of actions are usually brought by the former client because he has "nothing else to do," the fees for filing are typically waived, and the pleadings are construed more favorably to the non-attorney drafter. *Id.*

77. For the text of § 1983, see *supra* note 75. "[A] person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Polk County v. Dodson, 454 U.S. 312, 317 (1981) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

78. See, e.g., Minns v. Paul, 542 F.2d 899, 901 (4th Cir.) (holding public defender immune from § 1983 claims but noting that other remedies are available), *cert. denied*, 429 U.S. 1102 (1976); Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972) (holding public defenders immune from section 1983 claims but acknowledging that the Sixth Amendment may be used to vindicate criminal defendants' rights).

burden, or duty."⁷⁹ If someone enjoys immunity for his actions, he is not liable for them.⁸⁰ The rationale for immunity is derived from the notion that although the person has committed a wrong, important social values require that the person not be liable.⁸¹ As Judge Learned Hand expressed, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."⁸² The following sections address the different categories of immunity, including sovereign, or governmental immunity, official immunity, and judicial immunity.

1. *Sovereign Immunity*

Sovereign, or governmental immunity is the common law doctrine which serves to protect all levels of government from legal actions.⁸³ Unless the government has otherwise waived its immunity, this doctrine protects all of its acts or omissions.⁸⁴ In 1946, the United States federal government waived its tort immunity, subject to important exceptions,⁸⁵ when Congress enacted The Federal Tort Claims Act.⁸⁶ Under one of these exceptions, the federal government retains its sovereign immunity for "discretionary functions."⁸⁷ Generally, this provision encompasses conduct that involves any sort of policy judgment.⁸⁸

79. BLACK'S LAW DICTIONARY 751 (6th ed. 1990).

80. KEATON et al., *supra* note 68, § 131, at 1032.

81. *Id.* For example, immunity is granted not so much for the individual's personal benefit, but more for the "protection of government, which could not function if its officials . . . had to bear the vexation, time-consuming hardship, and risk of monetary loss inherent in responding to civil suit." Comment, *Liability of Court-Appointed Defense Counsel for Malpractice in Federal Criminal Prosecutions*, 57 IOWA L. REV. 1420, 1423 (1972).

82. *Georgie v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

83. KEATON et al., *supra* note 68, § 131, at 1033.

84. RESTATEMENT (SECOND) OF TORTS § 895 B (1979).

85. These exceptions include, among others, claims of negligent transmission of letters or postal matter, claims of assault, battery, false imprisonment, libel or slander, and claims arising in a foreign country. 28 U.S.C.A. § 2680 (West 1994).

86. *Id.* §§ 1346(b), 2671-680. The act states that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 2674; *see also* The Tucker Act, 28 U.S.C.A. §§ 1346(a)(2), 1491 (1994) (waiving government's non-tort liability; this act was passed in 1887).

87. 28 U.S.C.A. § 2680(a) (West 1994). The relevant part of this exception applies to "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused." *Id.*

88. KEATON et al., *supra* note 68, at 1039. Discretionary acts and functions have been defined

The states similarly have limited their tort immunity.⁸⁹ Most states abrogated their absolute immunity either by statute or judicial decision.⁹⁰ States usually replace their complete sovereign immunity with a statutory form of immunity, through the states' tort claims act.⁹¹ Even where states have waived part of their immunity, though, all have preserved the immunity with respect to basic policy or discretionary judgments.⁹²

2. *Official Immunity*

Closely tied to the government's sovereign immunity is the doctrine of official immunity. Generally, this doctrine blankets government officials personally with immunity for their actions, as long as their conduct "fall[s] within the scope of their authority" and the conduct "requires the exercise of discretion."⁹³ Early common law did not widely recognize this type of immunity for government officials.⁹⁴ However, by 1959, the Supreme Court, building on an earlier decision,⁹⁵ approved the extension of official immunity to even lower level federal government officials in *Barr v. Matteo*.⁹⁶ Furthermore, in 1988, Congress amended the Federal Tort Claims Act⁹⁷ by making it the exclusive remedy for claimants alleging common law

as "[t]hose acts wherein there is no hard and fast rule as to course of conduct that one must or must not take and, if there is clearly defined rule, such would eliminate discretion." BLACK'S LAW DICTIONARY 467 (6th ed. 1990).

89. However, Maryland and Mississippi have essentially retained their complete sovereign immunity. KEATON ET AL., *supra* note 68, at 1044 n.25.

90. BLACK'S LAW DICTIONARY 751 (6th ed. 1990); *see, e.g.*, WASH. REV. CODE ANN. §§ 4.92.090 & 4.96.010 (West 1988 & Supp. 1995) (waiving government's absolute immunity); *Mayle v. Pa. Dept. of Highways*, 388 A.2d 709, 709-10 (Pa. 1978) (abolishing doctrine of sovereign immunity and noting its unfairness).

91. *See* KEATON et al., *supra* note 68, at 1045 (discussing statutory forms of immunity); *see, e.g.*, NEV. REV. STAT. § 41.032(2) (1987) (dealing with government immunity provisions); 42 PA. CONS. STAT. ANN. §§ 8541-8564 (1982) (providing Pennsylvania's statutory government immunity provisions).

92. KEATON et al., *supra* note 68, at 1044; *see infra* note 93 and accompanying text (defining discretionary functions).

93. BLACK'S LAW DICTIONARY 1084 (6th ed. 1990).

94. Comment, *supra* note 81, at 1422-23 (discussing the development of official immunity).

95. *Spalding v. Vilas*, 161 U.S. 483, 498-99 (1896) (granting the same type of immunity judges enjoyed to the Postmaster General).

96. 360 U.S. 564 (1959). Concerned with the unfortunate impact that immunity has on individuals harmed by federal officials, the Supreme Court has strived to extend immunity only when necessary to promote effective government. *Westfall v. Erwin*, 484 U.S. 292, 299 (1988). This balancing test evolved into the "functional" approach to extending immunity, i.e. immunity attached only to particular official *functions*, not to particular *offices*. *Id.* at 296 n.3.

97. 28 U.S.C.A. §§ 1346(b), (West 1993).

wrongs committed by federal employees acting within the scope of their employment.⁹⁸ The amendments also explicitly extend this provision to officials and employees in all three branches of government.⁹⁹

On the state level, however, official immunity is not quite as expansive as that on the federal level. In most states, public officials enjoy only a qualified immunity for "discretionary" acts and no immunity for "ministerial" acts.¹⁰⁰ Also, the qualified immunity usually will not cover acts done with malice or bad faith, or objectively unreasonable conduct.¹⁰¹

98. *Id.* § 2679(b). The amendments, popularly known as the "Westfall Act," were Congress' response to the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). There, the Supreme Court held that absolute immunity from state-law tort liability does not attach to federal officials' conduct unless their conduct is "within the outer perimeter" of their duties and is "discretionary in nature." *Id.* at 300. The Westfall Act now provides absolute immunity to federal government officials for conduct within the scope of their employment, whether or not discretionary, by making the Federal Tort Claims Act the claimant's exclusive remedy. 28 U.S.C.A. § 2679(b) (West 1994). The full provision reads as follows:

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government -

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

Id.

99. 28 U.S.C.A. § 2671 (West 1994). The Westfall Act's exclusive remedy provision applies only to employees of the government "acting within the scope of [their] office or employment." *Id.* § 2679(b)(1). Section 2671 in turn defines "employee of the government" as including "officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." *Id.* Prior to the Westfall Act, "federal agency" was defined to include the executive branch of government only. See *Sullivan v. United States*, 21 F.3d 198, 201 n.5 (7th Cir.) (discussing the Federal Tort Claims Act as originally enacted), *cert. denied*, 115 S. Ct. 670 (1994). The 1988 amendments, though, expanded the definition of "federal agency" to include both the judicial and legislative branches of governments as well. 28 U.S.C.A. § 2671 (West 1994).

100. KEATON et al., *supra* note 68, § 132, at 1059. A "ministerial act" is defined as "[t]hat which involves obedience to instructions, but demands no special discretion, judgment, or skill." BLACK'S LAW DICTIONARY 996 (6th ed. 1990).

101. BLACK'S LAW DICTIONARY 752 (6th ed. 1990).

3. Judicial Immunity

The final type of immunity relevant to this Note is judicial immunity.¹⁰² Judicial immunity confers "absolute protection from civil liability arising out of the discharge of judicial functions" to every judge.¹⁰³ Judicial immunity is absolute in that it also applies to judicial actions¹⁰⁴ done in bad faith.¹⁰⁵ In addition to judges, judicial immunity has been extended to prosecuting attorneys, hearing officers, administrative law judges, and grand juries.¹⁰⁶ As one commentator has pointed out, however, a "notable exception to this extension of the immunity is the public defender, who is seen as a lawyer with a primary duty to a client rather than as a public official."¹⁰⁷ The next two sections fully explain how the federal and state courts have applied these doctrines of immunity to public defenders.

E. Federal Decisions on Immunity for Public Defenders

At one time, there was substantial authority among the federal courts holding public defenders immune from suits brought by for-

102. Another type of immunity which congressmen enjoy is legislative immunity. Article 1 of the Constitution confers immunity "for any Speech or Debate in either House." U.S. CONST. Art. 1, § 6, cl. 1. This has been construed to include "whatever a congressman feels necessary to transact the legislative functions and business," even if done with a bad motive. BLACK'S LAW DICTIONARY 900 (6th ed. 1990). Immunity protects legislators as long as their acts are of a legislative nature and are within the scope of their jurisdiction, even if done with malice or corrupt motives. KEATON et al., *supra* note 68, § 132, at 1056-57. Even if a state's sovereign immunity has been abrogated, a legislative and judicial immunity is preserved for legislation and judicial judgments. RESTATEMENT (SECOND) OF TORTS § 895B cmt. c (1979).

103. BLACK'S LAW DICTIONARY 848 (6th ed. 1990).

104. The immunity generally does not apply to non-judicial functions. *See, e.g.,* Scott v. City of Niagara Falls, 407 N.Y.S.2d 103, 106 (1978) (restating New York case law that the doctrine of judicial immunity does not apply to purely ministerial acts); *see supra* note 105 (defining "ministerial" act).

105. BLACK'S LAW DICTIONARY 848 (6th ed. 1990).

106. KEATON et al., *supra* note 68, § 132, at 1057-1058.

107. *Id.* at 1058. *But see* Dziubak v. Mott, 503 N.W.2d 771, 773 (Minn. 1993) (granting absolute judicial immunity to public defenders). For a discussion of *Dziubak*, *see infra* notes 264-322 and accompanying text. Furthermore, federal public defenders may now be accorded official immunity under the recently amended Federal Tort Claims Act. 28 U.S.C.A. §§ 1346(b), 2671-2680 (1994). *See supra* notes 98-99 and accompanying text (discussing the amendments which make the Federal Tort Claims Act the exclusive remedy in most claims against federal government officials and employees); *see also* Sullivan v. United States, 21 F.3d 198, 200 (7th Cir. 1994) (holding federal public defenders to be "employee[s] of the government" for purposes of the exclusive remedy provision of the Federal Tort Claims Act and thus not subject to suit personally), *cert. denied*, 115 S. Ct. 670 (1994).

mer clients.¹⁰⁸ As noted earlier, most actions brought against court appointed counsel were done so under section 1983, with indigent clients alleging a denial of their Sixth Amendment right to effective counsel.¹⁰⁹ Although section 1983 claims and malpractice claims are distinguishable on other matters, the policy considerations and arguments regarding immunity apply equally to both.¹¹⁰

1. Section 1983

Two issues are present in the section 1983 context, and the courts have responded differently to each. The first issue is whether the public defender acts "under color of state law,"¹¹¹ and the second is whether the public defender is immune from section 1983 claims, regardless of whether he acts under color of state law.¹¹² It should be emphasized that these two issues are very distinct, even though they may have the same practical effect. For example, if a court rules that public defenders do not act under color of state law, it effectively renders them immune from section 1983 claims.¹¹³ Some courts have held public defenders to be immune from section 1983 claims without addressing whether or not they even acted under

108. See, e.g., *Minns v. Paul*, 542 F.2d 899, 901 (4th Cir.) (holding public defenders to have absolute immunity from section 1983 claims), *cert. denied*, 429 U.S. 1102 (1976); *John v. Hurt*, 489 F.2d 786, 788 (7th Cir. 1973) (per curiam) (holding public defenders immune from section 1983 claims); *Brown v. Joseph*, 463 F.2d 1046, 1048 (3d Cir.) (holding public defenders to be immune under section 1983), *cert. denied*, 412 U.S. 950 (1972); *Sullens v. Carroll*, 446 F.2d 1392, 1393 (5th Cir. 1971) (per curiam) (granting immunity from malpractice to federal court appointed counsel); *Jones v. Warlick*, 364 F.2d 828, 828 (4th Cir. 1966) (per curiam) (extending absolute immunity from civil suit to court appointed counsel).

109. See *supra* notes 75-78 and accompanying text (discussing how criminal plaintiffs use § 1983 as a means of suing their attorney for denial of their Sixth Amendment right to effective counsel).

110. See *infra* notes 125-95 and accompanying notes (discussing immunity from § 1983 claims and immunity from malpractice claims, including a discussion of policy considerations).

111. See *Dodson v. Polk County*, 628 F.2d 1104, 1106 (8th Cir. 1980) (holding that public defenders do act under color of state law), *rev'd*, 454 U.S. 312 (1981); *Robinson v. Bergstrom*, 579 F.2d 401, 405-408 (7th Cir. 1978) (per curiam) (holding that public defenders do act under color of state law). *But see* *Slavin v. Curry*, 574 F.2d 1256, 1265 (5th Cir. 1978) (holding that public defenders do not act under color of state law), *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978); *Espinoza v. Rogers*, 470 F.2d 1174, 1175 (10th Cir. 1972) (per curiam) (holding that public defenders do not act under color of state law).

112. See *infra* notes 125-43 and accompanying text (discussing immunity under section 1983 claims).

113. This is because one of the elements of the claim is missing, thus jurisdiction does not attach. See notes *infra* 115-26 and accompanying text (discussing section 1983 claims and the required elements to sustain a cause of action).

color of state law.¹¹⁴ The importance of each issue's resolution will be discussed after they are explained in the following subsections.

a. Public Defenders Do Not Act Under Color of State Law

The question of whether a public defender acts under color of state law is significant because section 1983 only provides a cause of action to those who have been deprived of a constitutional right by a person acting under color of state law.¹¹⁵ The Supreme Court definitively resolved this issue in *Polk County v. Dodson*,¹¹⁶ when it ruled that public defenders do not act under color of state law.¹¹⁷ The Court stated that the public defender's "assignment entailed functions and obligations in no way dependent on state authority."¹¹⁸ The Court reasoned that the attorney-client relationship of a public defender was identical to that of a private attorney and client.¹¹⁹ The Court rejected the plaintiff's argument that the public defender's employment relationship with the state provided the basis of "acting under color of state law."¹²⁰ Instead, the Court noted that public defenders are not subject to the same administrative controls as other state employees.¹²¹ Furthermore, the Court reasoned that a state is constitutionally required "to respect the professional independence" of its public defenders,¹²² and this requires public defenders to "be free of state control."¹²³ Thus, the Court concluded that public defenders "do not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."¹²⁴

114. See *infra* notes 125-43 and accompanying text (discussing immunity under section 1983 and relevant case law discussing the extent of such immunity for public defenders).

115. For the full statutory provision, see *supra* note 75.

116. 454 U.S. 312 (1981).

117. *Id.* at 325.

118. *Id.* at 318.

119. *Id.*

120. *Id.* at 321.

121. *Id.*

122. *Id.* at 321-22.

123. *Id.* at 322; see also *id.* at 327 (Burger, C.J., concurring) (emphasizing the idea that the public defender acts completely independent of the state).

124. *Id.* at 325. The Supreme Court again reached the issue of whether a public defender acts under color of state law in a case involving a charge of conspiracy against a public defender. *Tower v. Glover*, 467 U.S. 914 (1984). The Court expounded on the earlier case of *Dennis v. Sparks*, 449 U.S. 24 (1980), in which the Court had ruled that private persons do act under color of state law when involved in a conspiracy with others who are state officials in order to deprive a person of constitutional rights. *Id.* at 27-28. Based on *Dennis*, the Court ruled that public defenders do act under color of state law if they engage in a conspiracy with state officials to deprive

b. Immunity under Section 1983

As noted earlier, immunity under section 1983 is a distinct issue from section 1983's requirement of acting under color of state law.¹²⁵ Although the difference is now only theoretical in the section 1983 context,¹²⁶ it remains important to discuss section 1983 immunity because of its relevance to malpractice immunity.

In *Brown v. Joseph*,¹²⁷ decided before *Polk County v. Dodson*,¹²⁸ the United States Court of Appeals for the Third Circuit held that a county public defender is immune from section 1983 liability, even if he was acting under color of state law.¹²⁹ The court correctly noted that the same arguments offered to prove that public defenders act under color of state law also justify granting immunity.¹³⁰ These arguments include the claim that public defenders are very similar to prosecutors, who already enjoy such immunity, because defenders have similar duties in a criminal proceeding, the law mandates both positions, and both should exercise independence in their duties.¹³¹ The court also believed there were policy considerations which warranted a finding of immunity.¹³² These concerns included the fear that liability would hinder recruitment of capable lawyers to the public defender office and that liability would have a "chilling effect" on the attorney's choice of strategies.¹³³

Similarly, the United States Court of Appeals for the Seventh Circuit, prior to *Polk County v. Dodson*,¹³⁴ held that public defenders enjoy immunity from section 1983 liability in *John v. Hurt*.¹³⁵

another of his constitutional rights. *Tower*, 467 U.S. at 916.

125. See *supra* notes 111-14 and accompanying text (discussing the requirement of under color of state law and discussing its distinction from immunity).

126. See *supra* note 113 and accompanying text (explaining when a court finds that public defenders do not act under color of state law, as the Supreme Court did in *Polk County*, it effectively renders them immune from suit because a jurisdictional requirement is missing).

127. 463 F.2d 1046 (3d Cir.), *cert. denied*, 412 U.S. 950 (1972).

128. 454 U.S. 312 (1981) (holding that public defenders do not act under color of state law).

129. *Brown*, 463 F.2d at 1048. This opinion later was criticized for "its unsoundness as policy" and because it ignored a lower court opinion of an opposite ruling. *Reese v. Danforth*, 406 A.2d 735, 739 n.8 (Pa. 1979); see Ronald E. Mallen, *The Court-Appointed Lawyer and Legal Malpractice — Liability or Immunity*, 14 AM. CRIM. L. REV. 59, 64 n.48 (1976) (stating that the court never discussed an unreversed lower court opinion that refused to grant immunity to public defenders).

130. *Brown*, 463 F.2d at 1049.

131. *Id.* at 1047-48.

132. *Id.* at 1049.

133. *Id.*

134. 454 U.S. 312 (1981) (holding that public defenders do not act under color of state law).

135. 489 F.2d 786, 788 (7th Cir. 1973) (*per curiam*).

The Seventh Circuit noted that the same reasons advanced for the claim that public defenders act under color of state law also support a finding of immunity.¹³⁶ The court listed arguments that public defenders act under color of state law: the defender is employed by the government, receives a salary and an office from the government, and appears to other people to possess state authority.¹³⁷ The court also based its decision on the same policies the Third Circuit¹³⁸ cited: to foster recruitment of lawyers and to encourage independence in their duties.¹³⁹

After these cases granting immunity under section 1983, the Supreme Court addressed this issue with respect to intentional misconduct on the part of public defenders, and held that there was no immunity.¹⁴⁰ The Court discussed arguments advanced in support of immunity, namely that public defenders have duties similar to judges and prosecutors, that the threat of liability for intentional misconduct could have a "chilling effect" on defense tactics, and that the ruling could lead to a floodgate of section 1983 claims.¹⁴¹ However, the Court explicitly found that the common law did not support a finding of immunity for the public defenders' intentional misconduct, like it would for prosecutors and judges.¹⁴² The Court declined to grant immunity and instead held that it was up to Congress to decide.¹⁴³

c. Section 1983 Cases & Malpractice.

As discussed above, both issues in the section 1983 context involve the same policy considerations. More importantly, it should be noted that the arguments the lower courts cited to support a finding of immunity from section 1983 liability actually conflict with the argu-

136. *Id.*

137. *Id.* at 787.

138. *Brown v. Joseph*, 463 F.2d 1046, 1048 (3d Cir.), *cert. denied*, 412 U.S. 950 (1972); *see supra* notes 131-37 and accompanying text (discussing the *Brown* opinion).

139. *Brown*, 463 F.2d at 1048. Other decisions that have extended immunity under section 1983 include *Robinson v. Bergstrom*, 579 F.2d 401 (7th Cir. 1978) (*per curiam*); *Miller v. Barilla*, 549 F.2d 648 (9th Cir. 1977); *Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976). *But see infra* note 176 and accompanying text (explaining that the Seventh Circuit later held that *Robinson* was most likely overruled).

140. *Tower v. Glover*, 467 U.S. 914, 916 (1984); *see also supra* note 124 (discussing the same decision and its holding that public defenders do act under color of state law when involved with other state officials in a conspiracy to deprive someone of his constitutional rights).

141. *Tower*, 467 U.S. at 922.

142. *Id.* at 921-22.

143. *Id.* at 923.

ments the Supreme Court cited to find that public defenders do not act under color of state law.¹⁴⁴ This conflict, though no longer of practical significance in the section 1983 context,¹⁴⁵ is important when addressing immunity in the malpractice context, on both the federal and state levels.¹⁴⁶ The arguments advanced both in support and in opposition of granting malpractice immunity to public defenders are based heavily on the same public policy concerns, hence, their adoption or rejection by other courts, particularly the Supreme Court, in section 1983 cases becomes relevant. These arguments in the malpractice context are explained more fully in the following sections.

2. *Malpractice*

In addition to section 1983 immunity, federal courts have also addressed malpractice immunity for federal public defenders.¹⁴⁷ This topic is somewhat more complex because within a relatively short time period, the courts and Congress have espoused dramatically different views on the subject.¹⁴⁸ This section discusses the different trends in this area and emerges with what is the current, and likely future, state of the law.

The earliest court decisions addressing the issue of malpractice immunity for federal public defenders granted such immunity. One of the first decisions was *Sullens v. Carroll*.¹⁴⁹ The United States Court of Appeals for the Fifth Circuit relied heavily on an earlier Fourth Circuit decision, *Jones v. Warlick*,¹⁵⁰ that extended absolute immunity from civil suit to federal court-appointed counsel, just as

144. See *supra* notes 129-39 and accompanying text (discussing arguments relied upon by the lower courts in support of granting section 1983 immunity to public defenders); see *infra* notes 116-24 and accompanying text (explaining the reasons for the Supreme Court's decision that public defenders do not act under the color of state law).

145. See *supra* notes 115-17 and accompanying text (discussing the jurisdictional requirements of a section 1983 claim).

146. See *infra* notes 147-258 and accompanying text (discussing federal and state courts' decisions on public defender immunity).

147. See *infra* notes 147-95 and accompanying text (discussing several federal court decisions addressing malpractice immunity for public defenders).

148. See *infra* notes 153-67, 177-92 and accompanying text (discussing the Supreme Court decision where immunity was not granted to appointed counsel under a section 1983 claim and Congress' enactment of the Federal Tort Claims Act that extended such immunity).

149. 446 F.2d 1392, 1393 (5th Cir. 1971) (per curiam) (granting malpractice immunity to federal court appointed counsel).

150. 364 F.2d 828 (4th Cir. 1966) (per curiam).

immunity extended to any other federal public official.¹⁵¹ Both decisions were based on the lower court's unpublished opinion in *Jones*, and therefore no substantial opinion from either court is available. As noted earlier, most actions against public defenders in federal courts are brought under section 1983, and therefore, federal courts appear to rarely address the issue of common law malpractice.¹⁵² However, the Supreme Court did have occasion to address malpractice immunity for federal court-appointed counsel in *Ferri v. Ackerman*.¹⁵³

In *Ferri*, the Supreme Court held that under federal law, attorneys appointed by a federal court judge are not entitled to absolute immunity in state malpractice suits.¹⁵⁴ In deciding the issue, the Supreme Court stated that such immunity, if it existed at all, would have to be supported by either the Criminal Justice Act of 1964¹⁵⁵ or the Supreme Court's cases dealing with immunity of federal officers.¹⁵⁶ The Court held that Congress had not intended to provide for a defense of immunity under the Criminal Justice Act.¹⁵⁷ Rather, Congress had attempted "to minimize the differences between retained and appointed counsel" and that Congress apparently "intended all defense counsel to satisfy the same standards of professional responsibility and to be subject to the same controls."¹⁵⁸ The Court then recognized the arguments for immunity, such as the fact that court appointed counsel are paid by federal funds, the risk of deterring lawyers from representing criminal defendants, and the prejudicial effect liability may in fact have on the indigent's case.¹⁵⁹ The Court dismissed these propositions, though, as "speculative" and lacking in empirical support.¹⁶⁰

151. *Id.* at 828.

152. *See supra* notes 75-78, 111-14 and accompanying text (discussing section 1983 claims in federal court).

153. 444 U.S. 193 (1979).

154. *Id.* at 205. The Court, however, did note that it was not deciding the question of whether states could provide absolute immunity under their own laws. *Id.* at 198.

155. 18 U.S.C. § 3006A (Supp. 1994). The Criminal Justice Act of 1964 was enacted to provide compensation for assigned counsel in federal criminal proceedings. *Ferri*, 444 U.S. at 199.

156. *Ferri*, 444 U.S. at 198.

157. *Id.* at 199.

158. *Id.* at 199-201.

159. *Id.*

160. *Id.* at 201. It should also be noted that Congress has enacted legislation designed to protect federal public defenders. *See* 18 U.S.C. § 3006A(g)(3) (Supp. 1994) (authorizing the Director of the Administrative Office of the United States Courts to indemnify or purchase liability insurance for federal public defenders).

The Court next addressed the argument that immunity should extend to court-appointed counsel because they are public officers, performing their official duties.¹⁶¹ The crux of this argument was that the court-appointed lawyer is like a judge or prosecutor, who are deemed federal officers in the judicial setting and thus enjoy immunity.¹⁶² However, the Court plainly responded that "[t]here is . . . a marked difference between the nature of counsel's responsibilities and those of other officers of the court."¹⁶³ Namely, the difference is that prosecutors and judges serve society's interest as a whole, while the public defender's primary duty is to his client.¹⁶⁴ The Court rejected the fallacious logic in the arguments for immunity, noting that "the fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently."¹⁶⁵ In sum, the reasons for extending immunity to judges and prosecutors, as well as other public officials, simply did not apply to public defenders.¹⁶⁶ The Court concluded that this type of decision was best left to Congress to decide on the basis of empirical data, and left open the possibility that an increase in court-appointed counsel's salaries might be the more prudent step to take.¹⁶⁷

Prior to the *Ferri* decision, several circuit courts held court-appointed counsel to be immune from liability as judges and prosecutors are, usually in the section 1983 context.¹⁶⁸ However, those holdings were weakened, if not overruled, by *Ferri*.¹⁶⁹ As one commentator noted, even though the Supreme Court did not discuss the circuit court opinions extending immunity to public defenders, it did recognize the same arguments courts typically had advanced in

161. *Ferri*, 444 U.S. at 202.

162. *Id.*

163. *Id.*

164. *Id.* at 203-04. In fact, "an indispensable element of the effective performance of [the public defender's] responsibilities is the ability to act independently of the Government." *Id.* at 204.

165. *Id.*

166. *Id.* The primary reason for extending immunity to public officials "is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion." *Id.* at 203-04.

167. *Id.* at 204-05. The increase in salary would serve to mitigate the fear that liability would prevent capable lawyers from representing indigent defendants. *Id.* at 205.

168. See *supra* notes 108, 127-39 and accompanying text (listing and briefly discussing some cases that granted immunity).

169. See *infra* notes 172-76 and accompanying text (discussing the court decisions that relied on *Ferri* to reject granting immunity to federal public defenders).

favor of immunity.¹⁷⁰ Therefore, “[s]ince the Supreme Court did set forth and reject the arguments which were the bases of such decisions . . . their viability as controlling precedent is doubtful.”¹⁷¹

The United States Court of Appeals for the Eighth Circuit expressed this sentiment one year following the *Ferri* decision in *White v. Bloom*.¹⁷² The Court of Appeals noted that at least four circuits had extended the immunity judges and prosecutors enjoy to court-appointed counsel.¹⁷³ However, in light of the *Ferri* decision, the court stated that the position adopted by the other circuits was “no longer tenable.”¹⁷⁴ The Eighth Circuit continued even further and held that although *Ferri* involved only a state malpractice claim, the Court’s logic also applied to section 1983 claims.¹⁷⁵ Thus, the court refused to grant the absolute immunity that judges and prosecutors share to appointed counsel.¹⁷⁶

Hence, the *Ferri* decision, and the line of cases following it, led some commentators to believe that the defense of immunity for public defenders in federal courts was “primarily of historical inter-

170. MALLEN & SMITH, *supra* note 61, § 17:7, at 22 (stating that the Supreme Court’s identification and rejection of the arguments which were the bases of the circuit courts’ rulings was tantamount to minimizing those cases’ precedential value).

171. *Id.*

172. 621 F.2d 276 (8th Cir.), *cert. denied*, 449 U.S. 945 (1980).

173. *Id.* at 280. These circuits included the Seventh, the Ninth, the Fourth, and the Third. For an example of these cases see, *e.g.*, Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978); Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977); Minns v. Paul, 542 F.2d 899 (4th Cir. 1976); and Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). For a fuller listing of cases granting immunity, see *supra* note 113.

174. *White*, 621 F.2d at 280.

175. *Id.* It should be noted that not all circuits had so interpreted *Ferri*. Rather, some of them construed *Ferri* as applying only to malpractice actions, and that section 1983 immunity was still valid. MALLEN & SMITH, *supra* note 61, § 17:7, at 22 (citations omitted). However, as discussed earlier, in Tower v. Glover, 467 U.S. 914 (1984), decided after these other cases, the Supreme Court found that absolute immunity for public defenders was not supported by the common law, and they could be liable for conspiracy under section 1983. *Id.* at 922.

176. *White*, 621 F.2d at 280. Other circuits similarly held that *Ferri* militated against granting immunity. See, *e.g.*, Glover v. Tower, 700 F.2d 556, 559 (9th Cir. 1983) (holding that *Ferri* precluded granting immunity to public defenders), *aff’d & remanded*, 467 U.S. 914 (1984); Hall v. Quillen, 631 F.2d 1154, 1155 (4th Cir. 1980) (stating that in light of *Ferri*, a prior decision granting immunity to public defenders may no longer be good law); see also Sullivan v. Freeman, 944 F.2d 334, 338 (7th Cir. 1991) (holding that *Ferri* most likely overruled an earlier decision granting absolute immunity to federal public defenders under federal law and that federal public defenders were not immune under Illinois law).

There was, however, one circuit court that ignored *Ferri*, and held public defenders to be immune from all Civil Rights Act claims. Without citing to *Ferri*, the Third Circuit held that public defenders, by virtue of acting within the judicial process, enjoy the same immunity as judges and prosecutors. Ross v. Meagan, 638 F.2d 646, 648-49 (3d Cir. 1981).

est."¹⁷⁷ However, with respect to malpractice immunity, the issue once again is receiving renewed scrutiny, this time in response to Congressional action. As noted earlier, the Supreme Court's decision in *Ferri v. Ackerman*¹⁷⁸ was addressing immunity for federal public defenders from state malpractice suits under federal law.¹⁷⁹ The Court found that such immunity was not supported by existing law,¹⁸⁰ and ruled instead that such a decision would have to be made by Congress.¹⁸¹ In 1988, Congress arguably did decide to extend such immunity.

In 1988, Congress amended the Federal Tort Claims Act¹⁸² to make it the exclusive remedy for claimants alleging torts committed by federal officers and employees acting within the scope of their employment.¹⁸³ Congress further amended the Act by extending the exclusive remedy provision to employees in the legislative and judiciary branches.¹⁸⁴ If the amendments apply, they require the claimant to proceed against the United States only and not the covered employees individually, thus, effectively rendering the employees immune from suit.¹⁸⁵ It should also be noted that although these amendments do not deprive a claimant of his cause of action, they ultimately serve to limit substantially any chance of recovery as the United States retains its immunity for "discretionary" functions and duties.¹⁸⁶

177. MALLEN & SMITH, *supra* note 61, § 17.7, at 17.

178. 444 U.S. 193 (1979).

179. *Id.* at 204.

180. *Id.*

181. *Id.* at 205.

182. 28 U.S.C.A. §§ 1346(b) (West 1993).

183. *Id.* § 2679(b)(1) (1994).

184. See *supra* note 99 and accompanying text (noting that the amended definition of "government employee" included employees in all three branches of government).

185. 28 U.S.C.A. § 2679(b)(1) (1994). For the full text of § 2679(b)(1), see *supra* note 98. For the provision to apply, the defendant employee must notify the Attorney General of the pending suit and the Attorney General must then certify that the employee was acting within the scope of his employment when the incident occurred. 28 U.S.C.A. §§ 2679(c)-(d) (1994). In the event the Attorney General refuses to certify the defendant employee, the employee may petition for court certification. *Id.* § 2679(d)(3). Once certification is made, the United States is substituted as the party defendant. *Id.* § 2679(d).

186. 28 U.S.C.A. § 2680(a) (1994). For a full discussion of the provision as well as a brief definition of "discretionary" acts, see *supra* notes 87-88. Relevant to this point is a study conducted by the ABA that indicated that administrative or clinical errors were only a small percentage of the errors alleged in criminal malpractice cases. Feeney & Jackson, *supra* note 35, at 393 (citing ABA STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE: A STATISTICAL STUDY OF DETERMINATIVE CHARACTERISTICS OF CLAIMS ASSERTED AGAINST ATTORNEYS (May 1986)). In contrast, substantive and client relations errors (arguably

The United States Court of Appeals for the Seventh Circuit appears to be the only court to consider the applicability of the amendments to federal public defenders. In *Sullivan v. United States*,¹⁸⁷ the court ruled that the exclusive remedy provision of the amended Federal Tort Claims Act did apply to federal court-appointed counsel, thus barring suit against them personally.¹⁸⁸ The court noted the Supreme Court's holding in *Ferri v. Ackerman*,¹⁸⁹ and the distinctions it made between appointed counsel and other public officers accorded immunity.¹⁹⁰ However, the Seventh Circuit also noted that *Ferri* suggested the possibility of Congress creating such immunity and found that it did so with the amendments to the Federal Tort Claims Act.¹⁹¹ The court thus affirmed the dismissal of the public defenders from the suit and the substitution of the United States as defendant.¹⁹²

Because this is apparently the first court to address this issue, it remains to be seen how other circuits will interpret the amendments and whether or not they will similarly rule federal public defenders to be "employees of the government" for purposes of the exclusive remedy provision. It appears, though, that the Seventh Circuit's interpretation of the amended Federal Tort Claims Act likely signals a new trend among federal courts of holding federal public defenders immune from malpractice liability.¹⁹³ In sum, although claim-

"discretionary" acts) comprised over half of the claims. *Id.*

The amendments to the Federal Tort Claims Act also explicitly allow the United States "to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee." 28 U.S.C.A. § 2674 (1994). In this respect, earlier case law addressing immunity for federal public defenders may still be relevant. *See supra* notes 147-81 and accompanying text (discussing the court decisions addressing federal public defender malpractice immunity). As of this writing, however, no cases have raised this issue directly.

187. 21 F.3d 198 (7th Cir.), *cert. denied*, 115 S. Ct. 670 (1994).

188. *Id.* at 203. The exclusive remedy provision applies to an "employee of the government," and the amendments broadened the definition of an employee to include officers and employees of any federal agency, which includes the judiciary. 28 U.S.C.A. § 2671 (1994). Hence, the court found that "the plain language of the statute" supported its holding. *Sullivan*, 21 F.3d at 202.

189. 444 U.S. 193 (1979) (holding that federal public defenders are not immune from state malpractice suits under federal law).

190. *Sullivan*, 21 F.3d at 203.

191. *Id.* The Seventh Circuit also found *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), ruling that federal public defenders do not act under color of state law when performing the traditional function of a lawyer, to be inapposite. *Id.* at 204. The court stated that the issue was not whether the public defenders acted under color of state law, but whether they were employees of the federal government. *Id.* The court found that *Polk County* confirmed that they were. *Id.*

192. *Id.* at 206.

193. *See* 9 FED. LITIGATOR 167, 168 (1994) (stating that *Sullivan* is a good example of the broad coverage of federal employees under the amended Act).

ants may still proceed against the United States, recovery will likely be rare as the United States retains its sovereign immunity for "discretionary" functions and duties.¹⁹⁴ Similarly, the trend among state courts is also to restrict recovery for malpractice by extending immunity to state public defenders, as discussed in the following sections.¹⁹⁵

F. States Refusing to Grant Malpractice Immunity to Public Defenders

Traditionally, public defenders have not received immunity for their actions.¹⁹⁶ Commentators explain that this is because public defenders are primarily viewed as lawyers with their main duty to their clients, as opposed to being viewed as public officials.¹⁹⁷ Court appointment does not make an attorney an agent of the state; he still "owes his client the same diligence and care as any privately retained attorney."¹⁹⁸

Hence, the majority of state courts addressing the issue have refused to grant malpractice immunity¹⁹⁹ and have provided a host of supporting reasons. The usual arguments asserted against immunity are that the public defender is not like a judge or prosecuting attorney, but rather like a private attorney whose only duty is to his client; the public defender is not a "public official" to whom official or statutory immunity attaches, but again, is like the private attorney; and it would be unfair to indigent defendants to lose this important civil remedy and may even be unconstitutional.²⁰⁰ These arguments are more fully developed in the following cases.

One of the first state court decisions to consider the question was the Connecticut Supreme Court in *Spring v. Constantino*.²⁰¹ The

194. See *supra* note 88 and accompanying text (discussing the meaning of "discretionary" duties and its potential application in the legal malpractice context).

195. See *infra* notes 234-55 and accompanying text (discussing state courts that have granted immunity from malpractice claims to public defenders).

196. KEATON ET AL., *supra* note 68, § 132, at 1058.

197. *Id.*

198. MEISELMAN, *supra* note 64, § 16:2.

199. *Spring v. Constantino*, 362 A.2d 871 (Conn. 1975); *Windsor v. Gibson*, 424 So. 2d 888 (Fla. Ct. App. 1982); *Donigan v. Finn*, 290 N.W.2d 80 (Mich. Ct. App. 1980); *Delbridge v. Office of the Pub. Defender*, 569 A.2d 854 (N.J. Sup. Ct. 1989); *Reese v. Danforth*, 406 A.2d 735 (Pa. 1979); *Williams v. Office of the Pub. Defender*, 586 A.2d 924 (Pa. Super. Ct. 1991).

200. See *infra* notes 203-29 and accompanying text (discussing arguments cited by the state courts in refusing to grant immunity).

201. 362 A.2d 871 (Conn. 1975).

state had advanced three different grounds for immunity, and the court rejected each of them.²⁰² The first basis offered for immunity was judicial immunity, in that the policy for judicial immunity should be applicable to public defenders, like it is to judges and prosecutors.²⁰³ The state argued that immunity for judges and prosecutors promotes freedom, independence, and "principled and fearless decision-making" by removing the threat of lawsuits.²⁰⁴ The court, however, rejected the argument that public defenders function as judges and prosecutors.²⁰⁵ Instead, the court held that the public defender's function was the same as any private attorney.²⁰⁶ Unlike the prosecutor, who is a "representative of the state," the public defender, upon assignment to his client, is a "representative of that client."²⁰⁷

The next basis the state offered for immunity was the common law doctrine of sovereign immunity which extends to public officials.²⁰⁸ The court rejected this on the ground that a public defender is simply not a state public official.²⁰⁹ The court held that although the state has to insure that indigent defendants are represented by counsel, the actual conduct of the public defender is hardly a governmental act.²¹⁰ The court stated that "[t]he principle that the state cannot function both as prosecutor and defender is so deeply rooted in our system of justice as to require no citation."²¹¹

The third ground the state offered was that public defenders were entitled to immunity because of statutory immunity that extends to public officers and employees of the state.²¹² The court rejected this as well because it perceived a difference between state employees on the one hand, and independent contractors, to whom immunity does not attach, on the other.²¹³ The court stated that public defenders are more like the latter because although the state has some control over the public defender, like where his office may be or who exactly

202. *Id.* at 873-79.

203. *Id.* at 873-74.

204. *Id.*

205. *Id.* at 874.

206. *Id.* at 874-75.

207. *Id.*

208. *Id.* at 875.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 875-76.

213. *Id.* at 878.

his clients are, this control does not penetrate his functions assumed by the attorney-client relationship.²¹⁴ Again, the court stated that the public defender's relation to his client is the same as that of a private attorney.²¹⁵ The court also noted that the source of the public defender's salary was irrelevant, his relation to his client is no different than a private attorney has with her client.²¹⁶ Thus, the court refused to grant public defenders immunity from malpractice liability.²¹⁷

Pennsylvania courts have ruled on public defender liability in the context of different types of immunity. The first opportunity was in 1979 with the state supreme court's decision in *Reese v. Danforth*.²¹⁸ The *Reese* decision addressed the doctrine of official immunity.²¹⁹ The court noted that merely because public defenders are paid by the state does not make them "public officers," but rather it is the nature of an office and its powers that do.²²⁰ The court stated that public defenders are like private attorneys, whose duty it is to represent the client, against the interests of the government.²²¹ The court found that "once the appointment of a public defender in a given case is made, his public or state function ceases and thereafter he functions purely as a private attorney concerned with servicing his client."²²² The court then considered two policy arguments advanced in support of immunity: the need to attract and sustain able lawyers to represent the indigent and the need for "unfettered discretion" in the performance of their duties.²²³ The court rejected these arguments on the ground that immunity is an exception that attaches only to certain offices.²²⁴ The court had already held that the public defender was not such an office and emphasized that the question "does not turn on the putative effect of the imposition of the financial burdens attendant to tort liability."²²⁵

The court then continued to hold that granting immunity would

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 879.

218. 406 A.2d 735 (Pa. 1979).

219. *Id.* at 738.

220. *Id.*

221. *Id.*

222. *Id.* at 739.

223. *Id.*

224. *Id.*

225. *Id.* at 739-40.

raise equal protection problems because it would deny a form of tort relief to a certain class of people who could not afford a private attorney.²²⁶ Finally, the court rejected the argument that other remedies, such as habeas corpus²²⁷ or the public defender's susceptibility to disciplinary actions, were enough to offset the client's injuries caused by his defender's malpractice.²²⁸ For these reasons, the court refused to extend immunity to public defenders.²²⁹

The reasoning used by the above courts in refusing to grant immunity has also been embraced by others, including the Michigan Court of Appeals,²³⁰ the First District Court of Appeals of Florida,²³¹ and the Superior Court of New Jersey.²³² Despite this history of holding public defenders liable for malpractice, however, the current trend in state courts is to extend such immunity to public defenders.²³³ The next section details these decisions.

G. States Granting Malpractice Immunity to Public Defenders

In recent years, several state courts have moved in the direction of extending immunity to public defenders from state malpractice

226. *Id.* at 740.

227. Habeas corpus is defined as "[a]n independent proceeding instituted to determine whether a defendant is being unlawfully deprived of his or her liberty." BLACK'S LAW DICTIONARY 709 (6th ed. 1990). The most common purpose of the writ is to "test the legality of the detention or imprisonment; not whether he is guilty or innocent." *Id.* at 710. The writ of habeas corpus is guaranteed by the United States Constitution (Art. I, § 9) and also by state constitutions. *Id.*

228. *Reese*, 406 A.2d at 741.

229. Pennsylvania again reached the issue, this time with respect to statutory immunity, in *Williams v. Office of the Pub. Defender*, 586 A.2d 924 (Pa. Sup. Ct. 1990). The superior court held that public defenders were not covered by the state Tort Claims Act, which provided immunity to local agencies or "public officials of some kind." *Id.* at 927. The court relied heavily on the *Reese* and the *Ferri* decisions in ruling that public defenders were not entitled to statutory immunity. *Id.* at 927-28; *see also Veneri v. Pappano*, 622 A.2d 977, 978 (Pa. Super. Ct. 1993) (reaffirming the refusal to grant immunity to public defenders).

230. *Donigan v. Finn*, 290 N.W.2d 80 (Mich. Ct. App. 1980) (holding that court appointed attorneys for indigent defendants are not immune from state malpractice arising from defense of the indigent defendants).

231. *Windsor v. Gibson*, 424 So. 2d 888 (Fla. Dist. Ct. App. 1982) (holding that the doctrine of judicial immunity did not preclude former client from suing public defender's office for malpractice arising out of representation of criminal defendant).

232. *Delbridge v. Office of the Pub. Defender*, 569 A.2d 854, 866 (N.J. Super. Ct. Law Div. 1989) (finding public defenders to have no immunity from suit arising out of legal malpractice); *see also Briggs v. Lawrence*, 281 Cal. Rptr. 578, 617 (Cal. Ct. App. 1991) (concluding that public defenders were public officials within the meaning of the state tort claims act which removed immunity for public officials, thus ruling public defenders to be state officials, the court actually rendered them liable for malpractice actions).

233. *See infra* notes 237-55 and accompanying text (discussing state court decisions holding public defenders to be immune for malpractice).

claims.²³⁴ Most of the reasons cited for such rulings are policy considerations such as the limited funds and heavy caseloads facing public defender offices, the possible "chilling effect" that liability would have on the public defender's defense strategies, and the problems that liability would have on recruiting attorneys to public defender offices.²³⁵ Also mentioned frequently is the difference between public defenders and private attorneys in that the public defender cannot decline a client, even one with a meritless case.²³⁶ This section discusses these cases and their arguments.

The earliest state court ruling on this issue was the Supreme Court of Niagara County's 1978 ruling in *Scott v. City of Niagara Falls*.²³⁷ The court considered the public defender a public official because he "serves the public as much as he serves his particular assigned client or clients."²³⁸ The court felt that due to limited funds and overburdened caseloads, "[t]he imposition of potential liability to every assigned client will no doubt have a detrimental effect on the Public Defender's ability to effectively allocate his limited time and resources."²³⁹ The court also believed that not granting immunity would make recruiting lawyers to the public defender office difficult.²⁴⁰

The court stated that the public defender was different from the private attorney because he is not able to decline a "frivolous matter."²⁴¹ Furthermore, the court stated that the indigent defendant could always proceed pro se or pursue post-conviction remedies like habeas corpus.²⁴² The court also noted that the public defender would still be subject to professional disciplinary action.²⁴³ The court concluded by extending judicial immunity to public defenders for any discretionary or judgmental acts performed in the course of

234. See, e.g., *Browne v. Robb*, 583 A.2d 949, 952 (Del. 1990), cert. denied, 499 U.S. 952 (1991); *Dziubak v. Mott*, 503 N.W.2d 771, 773 (Minn. 1993); *Ramirez v. Harris*, 773 P.2d 343, 344-45 (Nev. 1989) (per curiam); *Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103, 106 (N.Y. Sup. Ct., 1978).

235. See *infra* notes 238-45 (discussing these arguments advanced by the courts in favor of granting immunity).

236. See *Scott*, 407 N.Y.S.2d at 105 (holding public defender immune from personal liability due to judgment decision but not from negligent performance in purely ministerial task).

237. 407 N.Y.S.2d 103 (N.Y. Sup. Ct., 1978).

238. *Id.* at 105.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 106.

243. *Id.*

their duties,²⁴⁴ the purpose of which was to ensure "freedom to exercise judgment and discretion in making legal decisions or recommendations."²⁴⁵

The rest of the state courts that have granted immunity to public defenders have done so under statutory forms of official immunity, usually by interpreting their state tort claims acts to cover public defenders as "state employees."²⁴⁶ The Delaware Supreme Court, in *Vick v. Haller*,²⁴⁷ ruled that public defenders were "state employees" within the meaning of the state's Tort Claims Act.²⁴⁸ That statute provided state employees with a qualified immunity that would cover any discretionary acts performed in the course of duty, as long as the employee acted in good faith and was not grossly negligent.²⁴⁹ Therefore, the court allowed for a qualified immunity to be provided to public defenders against malpractice.²⁵⁰

In *Browne v. Robb*,²⁵¹ the Delaware Supreme Court reached the issue with respect to court appointed counsel.²⁵² The court ruled that court-appointed counsel also receive qualified immunity under the state Tort Claims Act.²⁵³ The court approvingly cited three policy reasons in support of immunity: to allow counsel to "fearlessly

244. The court also noted that because public defenders enjoyed this immunity, the immunity also extended to the county. *Id.* The court noted, however, that any negligence in the performance of a "ministerial" task would not be protected by immunity, and the county could then be held liable. *Id.*

245. *Id.* The court cited approvingly several of the federal court decisions granting immunity under section 1983, particularly *Brown v. Joseph*, 463 F.2d 1046, 1049 (3d Cir. 1972) (holding public defenders immune under section 1983). *Id.*

246. Some states explicitly grant qualified official immunity to public defenders by statute. Nevada expressly includes the Public Defender and his deputies in its statute that defines who is subject to qualified official immunity. NEV. REV. STAT. § 41.0307 (4)(b) (1990) (defining public defenders as a public officer or officer protected by the immunity statute); *id.* § 41.032(2) (1989) (mandating that officers of the state cannot be sued for malpractice arising out of discretionary decisions made pursuant to her duties); see *Ramirez v. Harris*, 773 P.2d 343, 344 (Nev. 1989) (*per curiam*) (applying the statute to a public defender accused of malpractice and a civil rights action). Nevada's statute was later amended to also include court-appointed defense attorneys. Act of July 12, 1993, ch. 547, sec. 3, § 41.037 (4)(b), 1993 Nev. Stat. 2261 (to be codified at NEV. REV. STAT. § 41.0307 (4)(b)). Another state is Minnesota itself, which categorized public defenders as state employees under its tort claims act. MINN. STAT. ANN. § 3.732 (West Supp. 1995). Minnesota's statute provides that state employees will not be liable for ministerial acts or omissions performed with due care or for discretionary acts or omissions. *Id.* § 3.736 (3)(a)-3(b).

247. 522 A.2d 865 (Del. 1987).

248. *Id.*

249. *Id.* at 866.

250. *Id.*

251. 583 A.2d 949 (Del. 1990).

252. *Id.*

253. *Id.* at 950.

and independently" litigate claims, to protect the public defender in light of his duty to take on any client, and to recognize society's "interest in avoiding duplicitous litigation."²⁵⁴ Therefore, unless an indigent client could overcome the statutory presumption of immunity granted to state employees, the court-appointed attorney, like the public defender, was immune from his own malpractice.²⁵⁵

Until recently, these cases and statutes represented the extent to which public defenders were accorded immunity from malpractice.²⁵⁶ These same cases and statutes led commentators to note that *absolute* immunity had been consistently rejected by the courts, even if *qualified* immunity was becoming more common.²⁵⁷ Last year, however, the Minnesota Supreme Court rendered its sweeping decision in *Dziubak v. Mott*.²⁵⁸ This opinion is discussed in the following section.

II. SUBJECT OPINION

A. *Factual Background*

Richard Dziubak was charged with the murder of his mother, May Speiser, who was found dead in her home on February, 27, 1987.²⁵⁹ A broken handrail and blood were found on the stairs leading to the basement, and during the autopsy, the medical examiner found a note tucked in Speiser's underwear that read "Dick [Richard] killed me — threw me down basement."²⁶⁰ The examiner ruled the death a homicide caused by a blunt head trauma, consistent with a fall down the stairs.²⁶¹ The examiner also read a toxicology report as indicating only a non-lethal amount of anti-depressants in Speiser's blood.²⁶²

Two public defenders, Thomas Mott and James Hanks, were as-

254. *Id.* at 951 (citing *Reese v. Danforth*, 406 A.2d 735, 743 (Pa. 1979) (O'Brien, J., dissenting)).

255. *Id.* at 952.

256. *See supra* notes 234-54 (outlining these cases and statutes).

257. Laura C. Hart et al., *From Offense to Defense: Defending Legal Malpractice Claims*, 45 S.C. L. REV. 771, 796-98 (1994) (noting that public defenders are not immune from malpractice actions where attorney's behavior is outside of the bounds recognized for qualified immunity, i.e., where the attorney acts with malicious intent to injure her client).

258. 503 N.W.2d 771 (Minn. 1993).

259. *Dziubak v. Mott*, 486 N.W.2d 837, 838 (Minn. Ct. App. 1992), *rev'd*, 503 N.W.2d 771 (Minn. 1993).

260. *Id.* The writing was her own. *Id.*

261. *Id.*

262. *Id.*

signed to Dziubak, with his trial scheduled for April 27, 1987.²⁶³ The public defenders had retained a medical expert, Dr. Plunkett, to review the autopsy report and to draw conclusions from it.²⁶⁴ However, the public defenders did not actually speak with Dr. Plunkett until two days before trial was to begin.²⁶⁵ During that conversation, Dr. Plunkett told one of the defenders, "[Y]ou have a problem. I don't know why that woman is dead!"²⁶⁶ Dr. Plunkett explained that if Speiser actually suffered a head trauma, she would not likely regain consciousness, and that she most likely would not even know she was dying, and thus could not write the note.²⁶⁷ Dr. Plunkett further told him that she could have died from an overdose and that it would not necessarily have been disclosed on the toxicology report.²⁶⁸ Finally, he told Mott that Speiser had been on anti-depressants, which are prescribed for mental illness, including suicidal tendencies.²⁶⁹ The doctor said that it would be logical for a woman who was suffering from depression to be vindictive toward her children.²⁷⁰ He also said that it was possible that Speiser survived a fall or a push down the stairs, and then, as an act of revenge, wrote the note blaming her son, and took an overdose.²⁷¹ Further, this would make sense out of the note, because she would then know she was going to die.²⁷² The doctor said repeatedly that the medical examiner's account he was given to read "was the kind of thing you see on Saturday night T.V."²⁷³ At the end of this conversation, the defense attorney told the doctor that he would contact him later to schedule court appearances.²⁷⁴ The public defenders never contacted

263. At the time of the state's supreme court decision, one of those public defenders, Thomas Mott, was, and still is, a Judge of the Ramsey County District Court. Petition for Review at 1, *Dziubak v. Mott*, 486 N.W.2d 837 (Minn. Ct. App. 1992) (No. C7-91-2517), *rev'd*, 503 N.W.2d 771 (Minn. 1993).

264. Respondent's Brief at 4, *Dziubak v. Mott*, 486 N.W.2d 837 (Minn. Ct. App. 1992) (No. C7-91-2517), *rev'd*, 503 N.W.2d 771 (Minn. 1993).

265. *Id.* at 4-5.

266. *Id.* at A-19 (containing a memorandum written by Mott regarding his interview with Dr. Plunkett).

267. *Id.*

268. *Id.* at A-21.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at A-20; *see also id.* at A-19 (stating "[t]his is the stuff you see on Saturday night T.V.>").

274. *Id.* at A-21.

Dr. Plunkett again.²⁷⁵

The trial had been scheduled for the following Monday, but because the medical examiner was out of the country, trial had been postponed until May.²⁷⁶ However, the public defenders never told Dziubak that the trial had been postponed,²⁷⁷ and in fact they each testified that they thought it best for Dziubak to enter a guilty plea.²⁷⁸ They also never told Dziubak what Dr. Plunkett had said.²⁷⁹ Instead, in a sworn affidavit, Dziubak stated that his public defenders told him that Dr. Plunkett "would testify the same as Dr. Haus, the Ramsey County Medical Examiner, to the effect that the death was caused by a blunt instrument blow."²⁸⁰ They also told Dziubak that no witnesses would be called to bolster his defense, such as Dr. Plunkett or his siblings who could have testified as to the vindictiveness of the decedent.²⁸¹ Rather, Dziubak claimed that his public defenders placed him under "extreme pressure, duress and coercion" by telling him that "at trial he would be found guilty."²⁸² These statements were made minutes before Dziubak thought the trial was to begin, with the belief that he had no defense.²⁸³ At that point, Dziubak decided to plead guilty to a lesser charge, and was sentenced to 81 months in prison.²⁸⁴

Fifteen months later, Dziubak moved to vacate his guilty plea on the grounds of a lack of factual basis and on ineffective assistance of counsel.²⁸⁵ However, it was soon discovered by Dr. Plunkett that he had misread the toxicology report and there was indeed a lethal amount of anti-depressants in Speiser's blood, and this was consistent with his suicide theory.²⁸⁶ Dziubak amended his complaint, by removing the ineffective assistance of counsel claim, and instead ar-

275. *Id.*

276. Appendix of Appellants at A-115, *Dziubak v. Mott*, 486 N.W.2d 837 (Minn. Ct. App. 1992) (No. C7-91-2517), *rev'd*, 503 N.W.2d 771 (Minn. 1993) (containing an affidavit from Thomas Mott).

277. Respondents Brief at 4 (No. C7-91-2517).

278. *Id.* at A-117, (containing affidavits of both Mott and Hanks).

279. *Id.* at A-220-21 (containing an affidavit of Dziubak).

280. *Id.* at A-220.

281. *Id.*

282. *Id.*

283. *Id.* at A-222.

284. Brief of Petitioners at 2, *Dziubak v. Mott*, 503 N.W.2d 771 (Minn. 1993) (No. C7-91-2517).

285. *Id.* at 2-3.

286. *Id.* at 3.

gued on the basis of newly discovered evidence.²⁸⁷ The court then vacated the guilty plea, and Dziubak was tried and acquitted of all charges.²⁸⁸ In order to have his conviction set aside, receive a new trial, and secure defense counsel, Dziubak indebted himself \$32,000.²⁸⁹

B. Malpractice Claim

1. Lower Court

On June 19, 1990, Dziubak commenced his negligence action against his public defenders.²⁹⁰ The Ramsey District Court ruled that public defenders are not absolutely immune from civil suits.²⁹¹ The court noted the policy arguments in favor of immunity, such as the chilling effect on discretion, preventing loss of limited resources that would be needed to defend such suits, and the interference with recruitment to the public defender's office.²⁹² The court ruled, though, that these policy considerations did not compel immunity.²⁹³ The court distinguished judges and prosecutors, who are viewed as representing society, from the public defender, whose duty is to represent the client.²⁹⁴ The court also stated that immunity would deny indigent clients the right to sue, while non-indigent clients maintained the opportunity to do so.²⁹⁵ Finally, the court noted that over the course of 50 years, there had never been a case raising the issue, demonstrating that the policy concerns were "ill founded."²⁹⁶

2. Appellate Court

The Minnesota Court of Appeals affirmed the trial court's refusal to grant the public defenders immunity.²⁹⁷ The court, citing *Ferri v.*

287. Appendix of Appellants at A-225, *Dziubak v. Mott*, 486 N.W.2d 837 (Minn. Ct. App. 1992) (No. C7-91-2517), *rev'd*, 503 N.W.2d 771 (Minn. 1993).

288. *Dziubak v. Mott*, 486 N.W.2d 837, 839 (Minn. Ct. App. 1992).

289. Appendix of Appellants at A-12, *Dziubak*, (No. C7-91-2517) (containing copy of Dziubak's complaint).

290. *Dziubak*, 486 N.W.2d at 839.

291. Appendix of Appellants at A-226, *Dziubak*, (No. C7-91-2517) (containing district court's order and conclusions of law).

292. *Id.* at A-228 (containing memorandum explaining district court's order).

293. *Id.* at A-229.

294. *Id.*

295. *Id.*

296. *Id.* at A-229-30.

297. *Dziubak v. Mott*, 486 N.W.2d 837, 841 (Minn. Ct. App. 1992), *rev'd*, 503 N.W.2d 771 (Minn. 1993). The Court of Appeals did however rule in favor of defendants on grounds of collat-

Ackerman,²⁹⁸ stated that judges and prosecutors represent society as a whole, and therefore affect a wide range of people, each of whom could be a potential controversy.²⁹⁹ On the other hand, public defenders owe a single duty to an individual client, and the fear of liability for malpractice does not conflict with this duty to "zealously represent" that client.³⁰⁰ In fact, the possibility of liability can actually create an incentive for public defenders to perform their duties.³⁰¹ In conclusion, the court cited the trial court's opinion, stating that the lack of cases on the issue over a 50 year period demonstrates that the arguments for immunity are "exaggerated."³⁰²

3. *Minnesota Supreme Court*

The Minnesota Supreme Court reversed, holding public defenders to be absolutely immune from malpractice liability.³⁰³ The majority extended judicial immunity to public defenders for several policy reasons. First, the court believed immunity would allow public defenders to act freely in exercising judgment and thus protect the best interests of the client.³⁰⁴ The court acknowledged that private attorneys must also exercise independence with the risk of liability for malpractice, but the court noted that there are differences between the public defender and the private attorney that justified immunity for the former.³⁰⁵ These differences include the fact that a public defender cannot reject a client, while the private attorney is free to reject a client.³⁰⁶

Another key factor in the court's analysis was the underfunding of public defender offices.³⁰⁷ The court noted that the cost of having to defend against malpractice suits would only further drain the resources, thus hurting all indigent defendants.³⁰⁸ The majority be-

eral estoppel. *Id.* at 841.

298. For a discussion of *Ferri*, see *supra* notes 153-67 and accompanying text.

299. *Dziubak*, 486 N.W.2d at 840 (citing *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)).

300. *Id.*

301. *Id.* (citing *Ferri*, 444 U.S. at 204).

302. *Id.*

303. *Dziubak v. Mott*, 503 N.W.2d 771, 771-72 (Minn. 1993).

304. *Id.* at 775.

305. *Id.*

306. *Id.*

307. *Id.* at 775-76.

308. *Id.* at 776. The court also approvingly cited *Brown v. Joseph*, 463 F.2d 1046 (3d Cir. 1972), which held that public defenders were immune under section 1983. *Id.* at 777.

lieved that the injured client has sufficient remedies through the appeals process, post-conviction relief, and habeas corpus.³⁰⁹ Finally, the court expressed concern that an opposite ruling would lead to problems in recruiting lawyers to the public defender office.³¹⁰

4. *Dissenting Opinion*

Justice Gardebring, in her dissenting opinion, expressed strong concerns about the potential impact this decision will have on indigent defendants.³¹¹ Justice Gardebring acknowledged that the public defender would still be subject to professional sanctions, thus encouraging public defenders to act competently, but that in the meantime, the defendant may still be wrongly convicted of a crime.³¹² The dissent noted that even though post-conviction remedies are available, they hardly compensate the defendant for the time spent incarcerated.³¹³ Justice Gardebring firmly believed that the civil remedy of a malpractice claim was necessary.³¹⁴ Furthermore, the public defenders were likely covered by the state's indemnity provisions, thus overcoming any possible deterrence to the public defender's office, as well as assuring that public defenders will represent their clients without fear of liability.³¹⁵

Justice Gardebring noted that while it is true that public defenders are overburdened and underfunded, the majority's ruling did no more than "sanction the chronic underfunding."³¹⁶ Finally, she stated that there would be no onslaught of litigation because most claims would be dismissed, and it would be very difficult for an indigent defendant to even find a private attorney willing to take the case.³¹⁷ The Analysis section below demonstrates that Justice Gardebring wrote the more fair and convincing opinion and that the majority should have refused to grant such expansive immunity to public defenders.

309. *Id.* at 776.

310. *Id.* at 776-77.

311. *Id.* at 778 (Gardebring, J., dissenting).

312. *Id.*

313. *Id.* In Dziubak's case, this was sixteen months. *Dziubak v. Mott*, 486 N.W.2d 837, 839 (Minn. Ct. App. 1992), *rev'd*, 503 N.W.2d 771 (Minn. 1993).

314. *Dziubak* 503 N.W.2d at 778.

315. *Id.*

316. *Id.*

317. *Id.*

IV. ANALYSIS

Dziubak represents the latest development in an interesting, yet unwelcome, trend among state courts to hold public defenders immune from claims of malpractice. *Dziubak* intensifies this trend by being the first state court decision to grant absolute immunity³¹⁸ to public defenders. This Analysis demonstrates that the Minnesota Supreme Court wrongly decided the issue of immunity. The thrust of the majority's decision was that public policy concerns mandated granting immunity to public defenders.³¹⁹ However, not only are these grounds for immunity questionable, they operate to denigrate the rights of the indigent defendant greatly. The following subsections address each of the arguments the court relied on in its ruling.

A. *The Chilling Effect Argument*

The majority asserted that public defenders must be free to exercise independence and discretion in defending their clients, and that liability would hamper these efforts.³²⁰ This is a common view shared by supporters of immunity.³²¹ Concisely stated, the premise of the argument is that "[t]he very prospect of a lawsuit has the effect of inhibiting the lawyer in the exercise of judgment in the management of the defense."³²² However, the Supreme Court previously refuted this argument by stating that "[t]he fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with that function. If anything, it provides the . . . incentive . . . to perform that function competently."³²³

It would be difficult indeed to claim that the "independence" exercised by *Dziubak*'s public defenders led only to a stronger defense. Not only did the public defenders fail to speak with their medical expert until two days before trial was scheduled, but they also failed to tell *Dziubak* of the expert's doubts as to how Mae Speiser really died.³²⁴ It is true that some decisions are for the lawyer's judgment,

318. See *supra* notes 246-55 and accompanying text (discussing the state court decisions which granted qualified or limited immunity to public defenders but not an *absolute* immunity).

319. *Dziubak*, 503 N.W.2d at 775-76.

320. *Id.* at 775.

321. See, e.g., Ned J. Nakles, *Criminal Defense Lawyer: The Case for Absolute Immunity from Civil Liability*, 81 DICK. L. REV. 229, 230 (1977) (explaining and defending the rule of absolute civil immunity for criminal defense attorneys).

322. *Id.*

323. *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

324. *Dziubak v. Mott*, 486 N.W.2d 837, 839 (Minn. Ct. App. 1992), *rev'd*, 503 N.W.2d 771

but "the client should be appraised of all viable defenses and make the ultimate decision."³²⁵ In Dziubak's case, not only did there appear to be a lack of "independence" on defense strategy, but more of a lack of defense strategy altogether. Hence, the argument that this sort of behavior needs to be protected, under the guise of "independence" and "discretion," amounts to no more than unsupported rhetoric.

Furthermore, applying the "chilling effects" argument not only to Dziubak's attorneys, but to all public defenders, illustrates that the argument is greatly overstated. First, all private attorneys are subject to malpractice suits, and one could scarcely argue that this hinders their independence and ability to zealously represent their clients. In fact, malpractice liability is a safeguard that serves to motivate the lawyer to perform competently and provides the client with a cause of action should his lawyer fail in those duties.³²⁶ Second, in the majority of states, public defenders have never been immune for malpractice,³²⁷ and there have never been widespread reports of the fears they face.³²⁸ Thus, the "chilling effects" argument is exaggerated and based on mere speculation.³²⁹

Nonetheless, the argument has been strained by commentators, to the point where one author lamented that because the public defender "exerts every effort to provide effective representation, he should not be called upon to measure his every word in relation to the personal consequences of a damage suit by his client."³³⁰ Here again, the public defender's susceptibility to civil suit is vastly exaggerated. The lawyer is not liable for every mistake he makes in handling a client's case.³³¹ He is not liable for a mere mistake in judg-

(Minn. 1993).

325. MALLIN & SMITH, *supra* note 61, at 292 (describing the attorney's role in post-conviction matters as predominantly an advisor to his client).

326. For a brief overview of a legal malpractice claim, see *supra* notes 63-78 and accompanying text.

327. See *supra* notes 201-29 and accompanying text (outlining the state court decisions that refused to grant immunity).

328. See *Dziubak v. Mott*, 486 N.W.2d 837, 840 (Minn. Ct. App. 1992) (stating that the dearth of cases on the issue illustrates that the arguments for immunity are "exaggerated"), *rev'd*, 503 N.W.2d 771 (Minn. 1993).

329. *Id.*; see also *Ferri v. Ackerman*, 444 U.S. 193, 201 n.18 (1979) (stating that the arguments advanced in favor of immunity, such as inhibiting the public defender in his duties, were "speculative").

330. *Nakles*, *supra* note 321, at 233 (defending absolute civil immunity for criminal defense lawyers).

331. *Schnabel et al.*, *supra* note 66, at 322 (describing the duty of an attorney to his client and

ment.³³² He is also not typically responsible for honest and reasonable mistakes of law or selection of a remedy.³³³ The lawyer is not liable for an error he makes concerning a question of law in which there is reasonable doubt.³³⁴ Even the majority in *Dziubak* acknowledged that a negligence claim alleging a failure to pursue a certain strategy would most likely fail because honest errors do not automatically constitute malpractice.³³⁵

In addition to these limitations on liability, the client suing for malpractice must show, by a preponderance of the evidence,³³⁶ that not only was the attorney negligent, but that the attorney's negligence proximately caused the injury.³³⁷ This means that the client has to prove "that 'but for' the negligence of the lawyer, the client's . . . defense against a claim in the underlying action would have been successful."³³⁸ Some jurisdictions go even further, and require the client to show actual innocence before he can recover against his lawyer.³³⁹ In light of these limitations on liability and obstacles to recovery, the public defender enjoys wide latitude in his practice, and need not fear that every decision or action places him in jeopardy.

B. The Deterrence Argument

The majority was convinced that liability would discourage law-

his potential liability for his actions).

332. *Id.*; see *Bronstein v. Kalcheim & Kalcheim, Ltd.*, 414 N.E.2d 96, 98 (Ill. App. Ct. 1980) (stating that under Illinois law an attorney is not liable to his client for mere error in judgment).

333. Schnabel et al., *supra* note 66, at 323 (stating that a lawyer's liability does not generally extend to reasonable legal mistakes or an error in selection of a remedy); *Transamerica Ins. Co. v. Keown*, 451 F. Supp. 397, 401 (D.N.J. 1978) (stating that attorney's standard of care is measured by the knowledge and skill ordinarily possessed and exercised by others); *Banerian v. O'Malley*, 42 Cal. App. 3d 604, 613 (Cal. Ct. App. 1974) (stating that due to the complexities of the law and other circumstances, attorneys cannot be held legally responsible for honest and reasonable mistakes of law or errors made in the selection of a remedy).

334. Schnabel et al., *supra* note 66, at 322 (stating that a lawyer is not liable for errors concerning legal questions where there is reasonable doubt); see *Kirsch v. Duryea*, 578 P.2d 935, 938 (Cal. 1978) (following the rule that an attorney is not liable for being in error as to a question of law which reasonable doubt may be entertained by well-informed lawyers).

335. *Dziubak v. Mott*, 503 N.W.2d 771, 776 (Minn. 1993).

336. JOHN W. STRONG ET AL., *MCCORMICK ON EVIDENCE*, § 339, at 574 (4th ed. 1992).

337. MEISELMAN, *supra* note 64, § 3:1, at 39; see also *supra* notes 69-74 and accompanying text (discussing the elements of causation that some courts require be proven in a successful claim of malpractice).

338. MEISELMAN, *supra* note 64, § 3:1, at 40.

339. *Id.* § 16:1; see also *supra* note 73 (discussing court decisions requiring actual innocence be proven to succeed in a legal malpractice suit).

yers from working as public defenders.³⁴⁰ This is a popular argument asserted by courts granting immunity.³⁴¹ The majority, however, failed to account for the fact that most states never allowed immunity as a defense for malpractice.³⁴² Despite the risk of liability, though, public defender employment is notoriously a competitive process and a "highly sought-after job."³⁴³ After so many years of potential liability, it is doubtful that lawyers would suddenly be deterred from this career.

Important, too, is the fact that the majority never even discussed Minnesota's state tort claims act, which already likely provided a qualified immunity for the public defenders.³⁴⁴ The court thereby ignored the "broad protection already in place for public defenders."³⁴⁵ Hence, the court's reliance on deterrence concerns appears to be somewhat disingenuous.

Even if the deterrence concerns were proven to be valid, there are less extreme measures that could be employed to avoid them. For example, the Supreme Court has suggested that concerns of deterrence from the profession may be diffused by the simple step of increasing public defenders' salaries.³⁴⁶ Or, as Justice Gardebring noted in her dissenting opinion, state indemnification would be a viable option.³⁴⁷ As one commentator explains, states could provide

340. *Dziubak v. Mott*, 503 N.W.2d 771, 777 (Minn. 1993).

341. For an overview of state court decisions granting immunity to public defenders, see *supra* notes 234-57 and accompanying text.

342. KEATON ET AL., *supra* note 68, at 1058 (stating that public defenders are denied immunity because they are seen as lawyers with a primary duty to a client rather than as a public official). For a list of these decisions, see *supra* note 204.

343. Charles Ogletree, Jr., *Beyond Justifications: Seeking motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240 (1993).

344. See Jeffrey H. Rutherford, *Dziubak v. Mott and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 977, 1001 (1994) (discussing the *Dziubak* court's failure to analyze liability under the Minnesota Tort Claims Act); see also MINN. STAT. ANN. § 3.736 (3)(b) (West Supp. 1995) (providing immunity to the state and its employees for discretionary duties); *id.* § 3.732 (1) (including public defenders in the definition of state employees for purposes of the state's tort liability act).

345. Rutherford, *supra* note 344, at 1008. In doing so, the court wrongly denied Mr. *Dziubak* of an existing statutory mechanism that may have provided him a remedy. *Id.* at 1008-09.

346. *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

347. *Dziubak v. Mott*, 503 N.W.2d 771, 778 (Minn. 1993) (Gardebring, J., dissenting); see also Stephen L. Millich, *Public Defender Malpractice Liability in California*, 11 WHITTIER L. REV. 535, 540-41 (1989) (discussing the benefits of a state tort claims act construed to include public defenders, thus providing indemnity). Some states explicitly indemnify public defenders, such as Illinois, 5 ILCS 350/2 (a) (West Supp. 1995); see also *supra* note 160 (discussing the authority of the Director of the Administrative Office of the United States Courts to indemnify or purchase liability insurance for federal public defenders).

indemnity to public defenders under their tort claims acts, thus encouraging defenders to continue working.³⁴⁸ A similar alternative to immunity is for the state to purchase malpractice insurance for its public defenders.³⁴⁹

Both of these options, indemnity and state-covered insurance, are especially appealing in light of the fact that underfunding and excessive caseloads are beyond the public defender's control.³⁵⁰ It may seem unfair to hold the defender personally liable under these conditions.³⁵¹ Indemnity or insurance provided by the state may be an equitable compromise,³⁵² then, because these types of mechanisms would serve to protect the interests of both the public defender and the indigent client.³⁵³

C. *The Floodgates of Litigation Argument*

The majority also focused on the resources and time that would be directed from the public defender offices in having to defend against malpractice claims.³⁵⁴ The court believed that such claims would actually hurt indigent defendants on the whole by diverting scarce resources away from the clients' defenses and into the attorneys' defenses.³⁵⁵ The majority, though, while duly noting the gross

348. Millich, *supra* note 347, at 539-40.

349. See Ronald E. Mallen, *The Court-Appointed Lawyer and Legal Malpractice - Liability or Immunity*, 14 AM. CRIM. L. REV. 59, 70 (1976) (suggesting that public defender offices should provide insurance coverage for its attorneys); see also *supra* note 160 (discussing the authority of Director of the Administrative Office of the United States Courts to purchase malpractice insurance for federal public defenders).

350. *Dziubak*, 503 N.W.2d at 776 (describing an increasing crime rate, increasing claims of indigence and lower state budgets as responsible for creating an overworked and underfunded public defenders office).

351. *Id.* (stating that it would be an unfair burden to subject public defenders to malpractice due to impossible caseloads and underfunding which are both outside of the public defender's control).

352. Mandating the state to sustain the costs of malpractice suits is justified in light of the history of state and local governments allocating minimal percentages of criminal justice funds to public defense. Thus, it is equitable to hold the state responsible for the constraints public defenders work under. See *supra* notes 41-50 and accompanying text (discussing the chronic underfunding of public defense).

353. Millich, *supra* note 347, at 540 (suggesting that passing liability on to the public defender's employer through the Tort Claims Act would provide the incentive for more qualified public defenders and would thus help indigent defendants); see Rutherford, *supra* note 344, at 1006-10 (proposing a two-pronged solution of a) modifying the threshold for proving ineffective assistance of counsel and b) subjecting public defenders to a limited statutory liability, thus preserving the rights of indigent defendants without ignoring the plight of public defenders).

354. *Dziubak*, 503 N.W.2d at 775-76.

355. *Id.*

underfunding of public defense offices, did little more than "sanction [this] chronic underfunding."³⁵⁶ Furthermore, litigation would be a rare occurrence because not only would the indigent client have to find a private attorney willing to take the case,³⁵⁷ but he would also most likely have to allege some sort of innocence,³⁵⁸ thus weeding out the meritless claims.³⁵⁹

The Supreme Court has also considered the argument that liability would lead to an opening of the floodgates in litigation in *Tower v. Glover*.³⁶⁰ The Court stated, referring to whether it should extend immunity for section 1983 claims to court appointed counsel, that Congress should be the body to decide if such litigation is too burdensome.³⁶¹ Although this statement was made in the context of Civil Rights claims, the Court held that it did not have the right to establish immunities based on "what we judge to be sound public policy."³⁶² Similarly, state legislatures, aided with the benefit of empirical data, are the appropriate bodies to decide whether such immunity should be granted.³⁶³ Finally, as both lower courts in Minnesota observed, the small amount of cases in this area indicate that this concern is "ill founded" and "exaggerated."³⁶⁴

D. The Adequate Remedies Argument

The majority was satisfied that depriving the client of a malpractice claim would not result in unfairness because he would still have the appeals process, post-conviction remedies and habeas corpus available to him.³⁶⁵ While this may be true, it is of small comfort to the person who has already been convicted and sentenced to prison. In Dziubak's case, he spent sixteen months in jail, due to his defenders' negligence, while his only remedy was to have the plea set aside

356. *Id.* at 778 (Gardebring, J., dissenting).

357. *Id.*

358. *See supra* notes 67-74 and accompanying text (discussing the rather onerous burdens different courts require for a malpractice claim to succeed).

359. However, the majority was concerned not only with actual damage awards, but also with the fact that a malpractice suit would distract the public defender from his duties, and that discovery alone would consume precious resources, time and energy. *Dziubak*, 503 N.W.2d at 776.

360. 467 U.S. 914, 923 (1984).

361. *Id.*

362. *Id.*

363. *See Rutherford, supra* note 344, at 1008 (arguing that the state legislature is in a better position to make any decision on the issue of immunity).

364. *Dziubak v. Mott*, 486 N.W.2d 837, 841 (Minn. Ct. App. 1992), *rev'd*, 503 N.W.2d 771 (Minn. 1993).

365. *Dziubak*, 503 N.W.2d at 776.

and have his case go to trial.³⁶⁶ Post-conviction relief obtained his freedom, but it did not compensate him for the lost months of his life. In addition, he incurred \$32,000 in legal fees, for which he alone is now responsible.³⁶⁷

With respect to other forms of post conviction remedies, notably appeals, the United States Supreme Court has placed a very high burden of proof on the defendant appealing a conviction based on ineffective assistance of counsel.³⁶⁸ The Court, in *Strickland v. Washington*,³⁶⁹ held that there is a presumption that the attorney did act competently, and even if the defendant can show otherwise, relief will not be granted unless he can also show a reasonable probability that but for his attorney's ineffectiveness, the trial result would have been different.³⁷⁰

E. *The Public Defender v. Private Attorney Argument*

Finally, the majority believed that public defenders and private attorneys are different enough to justify extending immunity to the latter.³⁷¹ However, the Supreme Court has previously considered the arguments that public defenders are different from private attorneys and has rejected them each time.³⁷² The Supreme Court has stated that "the primary office performed by appointed counsel parallels the office of privately retained counsel."³⁷³ Except in the sense that he serves in accordance with statutory authorization and in order to provide the constitutionally required counsel, the public defender's

366. *Dziubak*, 486 N.W.2d at 839; see *Dziubak*, 503 N.W.2d at 778 (Gardebring, J., dissenting) (stating "[t]he presence of remedies to overturn the conviction due to ineffectiveness of counsel cannot fully 'right the wrong' done to someone who may have spent extended period of time incarcerated unjustly").

367. See *supra* note 289 and accompanying text (discussing how *Dziubak* indebted himself \$32,000 in order to have his conviction set aside, receive a new trial, and secure defense counsel).

368. See *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984) (describing the defendant's burden as onerous because counsel's errors must be so serious to deprive the defendant of a fair trial and judicial scrutiny of an attorney's performance is highly deferential).

369. 466 U.S. 668 (1984).

370. *Id.* at 693-94. The *Strickland* test also applies to habeas petitions based on incompetent assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986). Post-conviction remedies and habeas corpus proceedings also serve to weed out claims of malpractice. Many courts will not allow malpractice suits to proceed where the client was unsuccessful in his appeal and habeas corpus attempts based on attorney incompetence. *MEISELMAN, supra* note 64, §16:1. This is because the client is considered to be collaterally estopped, as the issue has already been decided. *Id.*

371. *Dziubak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993).

372. See *infra* note 377 and accompanying text (comparing private attorneys and public defenders and deciding that the two types of attorneys have the same principle responsibilities).

373. *Ferri v. Ackerman*, 444 U.S. 194, 204 (1979).

duty is not to the public at large, like a judge or other governmental official.³⁷⁴ Rather, "[h]is principle responsibility is to serve the undivided interests of his client."³⁷⁵ In light of these Supreme Court decisions, the arguments advanced by the Minnesota Supreme Court are poor support for a finding of immunity.³⁷⁶

Similarly, the majority of state courts reaching the issue have concluded that public defenders and court appointed counsel function more like private attorneys, rather than like judges, prosecutors, or other government officials entitled to immunity.³⁷⁷ Despite this large body of precedent, however, the Minnesota court has become the latest to disregard these decisions and extend immunity to public defenders.³⁷⁸ The impact of this decision is discussed in the following section.

V. IMPACT

Dziubak is a significant case because it indicates a troublesome trend in state law. In recent years, state courts have begun to extend immunity to public defenders for their malpractice.³⁷⁹ The ramifications of these decisions are quite serious and are explained in the following subsections.

A. Denying The Indigent A Civil Remedy

The most obvious result of decisions like these is that it leaves the indigent client with no civil remedy for injuries caused by his defender's malpractice. Nonetheless, the courts denying this cause of

374. *Id.*

375. *Id.*; see also *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (holding that public defenders do not act under color of state law. In so holding, the court stated that "[o]nce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program").

376. But see *supra* notes 182-95 and accompanying text (discussing the recently amended Federal Tort Claims Act and its likely application to federal public defenders).

377. See, e.g., *Spring v. Constantino*, 362 A.2d 871, 874-75 (Conn. 1975) (describing the public defender as a representative of his client that performs a similar role to that of a privately retained attorney); *Donigan v. Finn*, 290 N.W.2d 80, 82 (Mich. Ct. App. 1980) (refusing to draw a distinction between appointed and retained counsel in malpractice cases); *Reese v. Danforth*, 406 A.2d 735, 739 (Pa. 1979) (determining that a public defender, after appointment, functions purely as a private attorney); *Williams v. Office of the Pub. Defender*, 586 A.2d 924, 927 (Pa. Super. Ct. 1990) (finding no basis for differentiating between a public defender and a private attorney).

378. *Dziubak v. Mott*, 503 N.W.2d 771 (Minn. 1993).

379. See *supra* notes 234-55 and accompanying text (discussing trend in holding public defenders immune from malpractice liability).

action were satisfied that other legal provisions, such as habeas corpus and post-conviction relief, are sufficient to protect the client.³⁸⁰ While these remedies may obtain the defendant's freedom, they fail to compensate for the damages inflicted on the defendant. Richard Dziubak, for instance, lost sixteen months of his life in jail and incurred over \$30,000 to obtain his justice.³⁸¹ All he received, though, was a revocation of his guilty plea and a new trial.³⁸² This is why many commentators agree that a civil remedy is needed to truly protect the indigent defendant.³⁸³

B. Equal Protection Problems

The denial of a civil remedy to an indigent defendant also raises potential equal protection problems in that it denies a form of civil remedy to a particular class of people, while the remedy is available to those who can afford private counsel.³⁸⁴ As the Pennsylvania Supreme Court stated, this would lead to differentiating "between groups of plaintiffs based on their economic status" and that "[s]uch a distinction would raise troublesome equal protection questions."³⁸⁵

The equal protection concerns find their roots in several Supreme Court decisions, such as *Griffin v. Illinois*,³⁸⁶ wherein the Court stated that there is "no equal justice where the kind of trial a man gets depends on the amount of money he has."³⁸⁷ In *Griffin*, the Court found a violation of the equal protection clause where a state allowed only those who could afford court materials to appeal.³⁸⁸

380. See, e.g., *Dziubak*, 503 N.W.2d at 775 (stating that the defendant who thinks his attorney was negligent is not without remedies through the appeal process, motions for habeas corpus, and post conviction relief).

381. For the factual background of this case, see *supra* notes 259-89 and accompanying text.

382. For the factual background of this case, see *supra* notes 259-89 and accompanying text.

383. See, e.g., Mallen, *supra* note 349, at 69 (stating that "[a] grant of immunity to court appointed counsel will leave indigents with only habeas corpus relief for a conviction attributable to incompetence of counsel"); see also *Dziubak*, 503 N.W.2d at 778 (Gardebring, J., dissenting) (stating that "[t]he presence of remedies to overturn the conviction due to ineffectiveness of counsel cannot fully 'right the wrong' done to someone who may have spent extended periods of time incarcerated unjustly").

384. See Comment *supra* note 81, at 1420 (discussing equal protection problems with granting immunity to public defenders); see also *Reese v. Danforth*, 406 A.2d 735, 740 (Pa. 1979) (stating that the responsibilities of public defenders should not be affected by the economic status of their clientele).

385. *Reese*, 406 A.2d at 740.

386. 351 U.S. 12 (1956).

387. *Id.* at 19.

388. *Id.*

Blanketing public defenders with immunity from malpractice suits approaches the "paradigmatic example of a denial of equal protection. . . . [Requiring] that attorney's fees be paid as a prerequisite to bringing a subsequent suit for malpractice . . . draws economic lines of access to the courts."³⁸⁹ Accordingly, courts should be cautious in drawing such lines.

C. Alters the Traditional Role and Responsibilities of the Attorney

Any attempt by lawyers to limit their liability is generally considered unethical.³⁹⁰ Not only has the *Dziubak* decision flouted this maxim, but it also alters the traditional attorney-client relationship. This decision creates an interesting conflict in that the public defender, like any other attorney, has one primary purpose, and that is to serve his client's interests.³⁹¹ If the attorney negligently performs that duty, he, like any other professional, is potentially liable for malpractice.³⁹² Now, though, neither the public defender nor the state is responsible to the client for the public defender's malpractice; the court has, in a sense, allowed the state to step in to protect itself, while altering the traditional remedies a client has against his attorney.³⁹³ There are actually a number of public defenders who have argued against such extensions of immunity.³⁹⁴ For example, the Chief Public Defender of Hennepin County in Minnesota stated he was "strongly opposed" to immunity and referred to the idea as a

389. Comment, *supra* note 81, at 1428 (discussing *Griffin v. Illinois*, 351 U.S. 12 (1956) which found that allowing only those able to pay the cost of appellate materials to appeal was a violation of equal protection). The author further explains the Supreme Court's *Boddie v. Connecticut*, 401 U.S. 371 (1971) decision. *Id.* at 1428-29. In that case, the Court found a violation of the due process clause where a state required the indigent to pay a fee before allowing access to court for a divorce. *Boddie*, 401 U.S. at 374. The Court found that "due process requires . . . that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Id.* at 377. The author persuasively argues that a malpractice claim serves to allow the plaintiff to settle such claims of rights and duties. Comment, *supra* note 81, at 1428.

390. Mallen, *supra* note 349, at 69.

391. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1984) (describing a lawyer's primary responsibilities as representing a client and being an officer of the court).

392. See *supra* notes 63-74 and accompanying text (discussing malpractice liability).

393. See, e.g., *Spring v. Constantino*, 362 A.2d 871, 875 (Conn. 1975) (stating that the public defender's role is no different from that of a private attorney, and therefore provides no basis for extending immunity to the former).

394. See e.g., Smolowe, *supra* note 34, at 48 (discussing how a Louisiana lawyer brought suit against himself for malpractice); see also *infra* note 395 and accompanying text.

"slap at the poor."³⁹⁵

D. *The Decision Fails to Address the Real Problems*

The opinion is most disappointing for its failure to address the real problems plaguing public defenders. As discussed earlier, public defender offices suffer from significant underfunding and excessive caseloads.³⁹⁶ These problems are already immense, even without immunity, because, as one writer has aptly explained, politicians at most have "little to gain by advocating large expenditures for the defender office, and at worse, much to lose."³⁹⁷ Yet when a court or state grants immunity to public defenders, it does no more than implicitly sanction the problems facing the defense system.³⁹⁸

In fact, rulings like *Dziubak* may actually contribute to these problems. As Minnesota's chief state public defender, John Stuart, argued, there should be liability because then the state will be less likely to cut the public defender budget or staff if it knows it may be liable for such claims.³⁹⁹ Although granting immunity may be convenient in its simplicity, it only ignores, if not exacerbates, the real problems facing public defenders.⁴⁰⁰ The decision has a final unfortunate impact in that it "may adversely affect future consideration of immunity because it asserted, without citing empirical evidence, that absolute immunity will improve representation, promote professionalism and ease the burden on overworked defenders."⁴⁰¹

IV. CONCLUSION

Dziubak v. Mott signifies a dangerous trend in state public defense systems. With its sweeping decision, the court extended abso-

395. Margaret Zack, *State Court to Look at Indigents' Right to Sue Defenders*, MINNEAPOLIS STAR TRIB., Feb. 8, 1993, at A1.

396. See *supra* notes 40-61 and accompanying text (discussing the problems facing public defenders).

397. Mounts, *supra* note 33, at 481.

398. *Dziubak v. Mott*, 503 N.W.2d 771, 778 (Minn. 1993) (Gardebring, J., dissenting) (claiming that it is unfair to impose liability on public defenders with underfunded offices and overloaded caseloads).

399. Zack, *supra* note 395, at A1 (arguing risk of liability creates an incentive to keep staff).

400. It is imperative for an attorney to render effective legal services for the right to counsel to be meaningful. LEFSTEIN, *supra* note 35, at 5. Hence, the resolution lies in improving the system, not in granting immunity.

401. Rutherford, *supra* note 344, at 980; see also *Ferri v. Ackerman*, 444 U.S. 193, 200, 204 (1979) (indicating that decisions of immunity were best left to Congress to decide on the basis of empirical data and not mere speculation).

lute immunity to public defenders for their malpractice.⁴⁰² The court disregarded its own state tort claims act, as well as the body of precedent refusing to grant immunity to public defenders, and instead relied on speculative public policy arguments to justify its decision.⁴⁰³ While the opinion may be laudable in its attempt to ease the burden on public defenders, it only serves to denigrate the rights of the indigent. The decision is disappointing in its failure to address the real problem of underfunding and the harm it causes to those whom public defense is intended to protect. Future courts are advised to eschew the holding of *Dziubak* and to strive for greater protection of the rights of the indigent.

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402. See *supra* notes 303-10 and accompanying text (describing the Minnesota Supreme Court's decision to hold public defenders immune from liability).

403. See Rutherford, *supra* note 344, at 1001 (discussing the *Dziubak* court's failure to analyze liability under the Minnesota state tort claims act).

